Supreme Court, U.S.
FILED
OCT 3 1 1994
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No. A 94-651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V.,

Petitioner,

vs.

HIROKO SUGIMOTO, et al.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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[1] Required under Rule 14.1(k)(i) and omitted from Exportadora's Appendix.

[2] Required under Rule 14.1(k)(ii) and omitted from Exportadora's Appendix.

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[3] Required under Rule 14.1(k)(ii) and omitted from Exportadora's Appendix.

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The principal statutory provisions involved in this case are 28 U.S.C. §§ 1330, 1602-1611, the Foreign Sovereign Immunities Act ("FSIA"), which provide in relevant part:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity

with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the Untied States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial

activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605 (a)(1)-(5). General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage

to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . . .

* * * *

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

[19 F.3d 1309 (9th Cir. 1994)]

Hiroko SUGIMOTO; Kimiko Kodani; Mayumi Nukiwa; Eri Omachi; Kuniko Omachi, Plaintiffs-Appellees,

v.

EXPORTADORA DE SAL, S.A. DE C.V., Defendant-Appellant.

No. 93-55716.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 1, 1994.
Decided March 25, 1994.
As Amended July 1, 1994.

Wrongful death action was brought against corporation affiliated with government of Mexico, which operated salt plant in remote area of Mexico, for deaths of plant visitors in crash of air taxi chartered by corporation. The United States District Court for the Southern District of California, James M. Fitzgerald, J., held corporation liable, and corporation appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) corporation was engaged in commercial activity in the United States when air taxi flew in United States airspace, thus conferring jurisdiction over corporation; (2) there was no clear error in conclusion that it was negligent mistake by pilot that was cause of accident; and (3) corporation was liable for pilot's negligence though pilot was employee of air taxi company.

Affirmed.

1. International Law

District court had jurisdiction over corporation

affiliated with government of Mexico in wrongful death suit arising from crash of air taxi chartered by corporation, in that corporation was engaged in commercial activity within the United States when air taxi flew in United states airspace, and element of wrongful death claim consisted in tortious flying of air taxi in United States airspace. 28 U.S.C.A. § 1605(a)(2).

2. Aviation

There was no clear error in district court's conclusion that it was negligent mistake by pilot that was cause of accident when aircraft crashed into hill in fog; rather than presuming that failure must have been pilot's, district court eliminated variety of other possible causes of crash and relied on opinion of aviation accident investigator whom it found credible and reliable.

3. Master and Servant

Under California law, rule that one is not liable for tortious acts of independent contractor can be said to be general only in sense that it [is] applied when no good reason is found for departing from it. Restatement (Second) of Torts § 409 comment.

4. Aviation

Operator of salt plant in remote area of Mexico was liable for pilot's negligence in crash of aircraft carrying plant visitors, though pilot was employee of independent air taxi company from which plane was chartered, where operator controlled transportation offered to business visitors to its plant and company town, it decided whether visitors from abroad were welcome, approved them, arranged for the transportation, paid all their expenses, and fed them, and it determined where they would stay, how they would come, and how they would go.

Clyde Greco, Jr., Greco & Traficante, San Diego, CA,

for defendant-appellant.

Robin Foor, Belmont, CA, for plaintiffs-appellees.

On Appeal from the United States District Court for the Southern District of California.

Before: TANG, PREGERSON and NOONAN, Circuit Judges.

NOONAN, Circuit Judge:

Exportadora De Sal, S.A. De C.V. (Exportadora) appeals from the judgment entered after a bench trial in a wrongful death action brought by the survivors of Katsuo Sugimoto, Yoshihito Kodani and Hideo Omachi (the plaintiffs). We have jurisdiction under 28 U.S.C. § 1330, and affirm.

FACTS

Exportadora is a manufacturer of salt owned 51 percent by the government of Mexico and 49 percent by Mitsubishi Corporation of Japan. Exportadora is a major producer of salt, which it markets internationally. It has a manufactory of salt at Guerrero Negro, Mexico. The plant is located in a company town. The most convenient city in proximity to Guerrero Negro is San Diego, California. Exportadora maintained an office in San Diego.

It is possible to get to Guerrero Negro from San Diego by bus, but the only convenient way of getting there is by Exportadora arranging a flight from Tijuana, Mexico to Guerrero Negro. For visitors to Guerrero Negro accepted by Exportadora, the practice was for the company to send a van to its San Diego office to transport them to the Tijuana airport. There was no telephone at the plant and it communicated with outside parties by telex to the San Diego

office.

On September 4, 1987 an employee of Mitsubishi asked Exportadora to provide transportation for Omachi to Guerrero Negro by car and company plane. Mitsubishi's telex noted that Omachi was a manager for Asahi, one of Exportadora's most important Japanese customers. A second telex from Mitsubishi to Exportadora stated, "We hope that your beautiful explanation and arrangements will charm him very much." A third telex thanked Exportadora for accepting "Omachi's visit to G.N."

On September 18, 1987 Mitsubishi asked Exportadora to arrange for transportation to Guerrero Negro for Sugimoto and Kodani by pick-up truck and company plane. Sugimoto and Kodani were professors of Tottori University in Japan and were interested in an agricultural project at Guerrero Negro. On September 22 Sugimoto and Kodani arrived by air in San Diego and were met by a representative of Exportadora, who arranged for their overnight stay in San Diego. The following day Exportadora had them transported to the Tijuana airport from which they flew in the company plane to Guerrero Negro. The company prepared a schedule showing that they would return to Tijuana on September 30.

On September 27 Omachi arrived at San Diego and on the following day was transported by Exportadora's van to Tijuana and by company plane to Guerrero Negro. His return was also scheduled for September 30. In Guerrero Negro Omachi, Sugimoto and Kodani were fed in the Exportadora company dining room and were housed without charge at Exportadora's guest quarters.

The company plane was not available on September 30 because of a directors' meeting. An Exportadora employee chartered an air taxi company to carry the scheduled passengers from Guerrero Negro to Tijuana.

Flying in heavy fog on the morning of September 30 in air space of the United States, the pilot of the air taxi

crashed into a hill outside of Tijuana and fell on American soil. The district court found the crash due to the pilot's negligence in descending below the proper glide path and in not executing a missed approach when required to do so.

The crash killed the pilot and the passengers.

PROCEEDINGS

The plaintiffs brought suit against Exportadora. Exportadora challenged the jurisdiction of the district court on the ground of its sovereign immunity under 28 U.S.C. §§ 1603(a), (b)(2) and when the district court held it had jurisdiction, Exportadora appealed to this court. We held that in transporting Omachi, Sugimoto and Kodani Exportadora had been engaged in commercial activity in the United States and so fell within one of the exceptions of the Foreign Sovereign Immunities Act, *viz.* "the action is based upon a commercial activity carried on in the United States by a foreign state." 28 U.S.C. § 1605(a)(2). *Schoenberg v. Exportadora,* 930 F.2d 777 (9th Cir.1991). We found the commercial activity to lie in Exportadora's "arranging transportation for its prospective business partners" in the case of Omachi and appeasing the Mexican government in the case of the transportation provided to Sugimoto and Kodani. *Id.* at 780.

On remand, a bench trial was held in which the district court found Exportadora liable on the basis of several theories of liability. Exportadora appeals.

ANALYSIS

Jurisdiction

[1] Exportadora raises again the question as to jurisdiction, contending that despite *Schoenberg,* the issue remains open in the light of *Saudi Arabia v. Nelson,* -- U.S. --,

113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). The plaintiffs argue that Exportadora waived jurisdiction after the decision in this court in *Schoenberg*. We need not address that argument, because we hold that under the precise test set by *Saudi Arabia* jurisdiction exists.

According to *Saudi Arabia*, an action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States. *Id.* -- U.S. at --, 113 S.Ct. at 1477. In the instant case Exportadora was engaged in commercial activity within the United States when the air taxi flew in United States air space, and an element of the plaintiffs' claim consists in the tortious flying of the plane in United States air space. The jurisdictional requirement of the first clause of § 1605(a)(2) was met.

Tortious Conduct

[2] On appeal Exportadora argues that the district court found pilot negligence by indulging the presumption that if the plane hit a hill in the fog, the failure must have been the pilot's. On the contrary, the district court eliminated a variety of other possible causes of the crash and relied on the opinion of an aviation accident investigator whom it found credible and reliable. There was no clear error in the district court's conclusion that it was a negligent mistake by the pilot that was the cause of the accident.

Basis for Liability

[3,4] Exportadora presses that it should not be held liable for the pilot's negligence when the pilot was the employee of the air taxi, which the district court characterized as "an independent contractor." The general rule is clear that one is not liable for the tortious acts of an independent contractor. The rule is riddled with exceptions so that there is "only a small area in which the so-called

general rule operates." 6 Witkin. *Summary of California Law* § 1009 (1987). California law in this respect is in harmony with the *Restatement (Second) of Torts* § 409, comment b, which states that the rule "can now be said to be general only in the sense that it is applied when no good reason is found for departing from it."

Here there is good reason for departing from the already-eroded rule. Exportadora controlled the transportation offered to business visitors to its plant and company town. Exportadora decided whether visitors from abroad were welcome, approved them, arranged for their transportation, paid all the expenses, fed them, determined where they would stay and how they would come and how they would go. Exportadora remains liable for the enterprise, although the air taxi was an independent taxi: "the enterprise, notwithstanding the employment of the independent contractor, remains the employer's" when it "is the party primarily to be benefited . . . selects the contractor . . . is free to insist upon one who is financially responsible, and to demand indemnity from him, [and] the insurance necessary to distribute the risk is properly a cost of the employer's business." *Van Arsdale v. Hollinger.* 68 Cal.2d 245, 253, 66 Cal.Rptr. 20, 25, 437 P.2d 508, 513 (1968). As a matter of California law Exportadora was liable for the tortious performance of the pilot.

AFFIRMED.

[Filed May 7, 1993]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, et al.,	)	
	)	Civil No. 88-1532R(POR)
Plaintiffs,	)	Consolidated
	)	Civil No. 88-1920R(POR)
vs.	)	
	)	
EXPORTADORA DE SAL S.A. DE C.V., a foreign corporation,	)	
	)	
Defendants.	)	

ORDER

On March 9, 1993, I entered on the record my findings of fact and conclusions of law on Exportadora's liability in this matter. While the default judgment against defendant Aviones de Sonora had been the subject of pretrial motions, these motions were not renewed at trial. It was expected that plaintiffs would file a proposed form of judgment including Aviones with supporting memoranda for the default judgment. Instead, based on discussions between the clerk and plaintiffs' counsel, judgment was entered based on the partial findings and conclusions. Plaintiffs now move to amend both the partial findings and conclusions and the judgment. Exportadora opposes the motion. I now grant in part and deny in part the motion to amend the findings and conclusions. because the prior judgment was erroneously

entered and did not reach the liabilities of all of the parties, I hereby vacate the judgment dated March 19, 1993. I have now considered the renewed motion for default judgment against Aviones de Sonora. A new judgment including all parties is attached with this order.

The parties agree that the findings contain a clerical error in the computation of noneconomic damages for plaintiffs. I therefore amend findings 186 through 188 as follows:

> (186) I find that the present value of the economic damage sustained by Mrs. Sugimoto is $342,175. I find that Mrs. Sugimoto's life expectancy is ten years from the date of trial. The trial occurred approximately five years and three months after the accident. I find that Mrs. Sugimoto sustained a noneconomic loss of $20,000 per year. Mrs. Sugimoto's noneconomic damage before trial amounts to $105,000. The present value of Mrs. Sugimoto's noneconomic damage after trial is $170,604. Mrs. Sugimoto's total damage amounts to $617,779.
>
> (187) I find that the present value of the economic damage sustained by Mrs. Kodani is $604,239. I find that Mr. Kodani's life expectancy is nineteen years from the date of trial. I find that Mrs. Kodani sustained a noneconomic loss of $25,000 per year. Mrs. Kodani's noneconomic damage before trial amounts to $131,250. The present value of Mrs. Kodani's noneconomic damage after trial is $358,000. Mrs. Kodani's total damage amounts to $1,093,489.
>
> (188) I find that the present value of the economic damage sustained by Mrs. Omachi is $1,435,222. I find that Mr. Omachi's life expectancy is thirty-one years from the date of trial. I find that Mrs. Omachi sustained a noneconomic loss of $25,000 per year. Mrs. Omachi's noneconomic damage before

trial amounts to $131,250. The present value of Mrs. Omachi's noneconomic damage after trial is $500,000. Mrs. Omachi's total damage amounts to $2,066,472.

The attached judgment incorporates these new damage amounts.

Page 14, line 8 is amended to correctly state the year of the accident as 1987. Page 86, line 18 is amended to read "Exportadora was responsible for the flight of XAKOA from Guerrero Negro to". Page 96, line 11 is amended to read "Plaintiffs have failed to carry their burden of". Page 100, line 14 is amended to read "Mayumi, the oldest, and the second daughter Kyoko". The first word on line 6 of page 114 should be "occasions" rather than "occasion".

This court rejected the claims of Mayumi Nukiwa and Eri Omachi for damages based on the evidence presented at trial. Ms. Nukiwa's claims of economic damage from the loss of expected gifts were not sufficiently supported by the evidence at trial. Ms. Nukiwa has not lived with her father for some time and her claim for noneconomic damage for the loss of his companionship was is rejected. Eri Omachi's claim for noneconomic and economic damage is primarily based on a figure of five hours of teaching and advice. This figure was given to plaintiffs' economics expert by plaintiffs' counsel. It was not sufficiently supported by the record. Plaintiffs' claims for damages for Mayumi Nukiwa and Eri Omachi are rejected on the evidence.

Plaintiffs' request to change the damage award for the change in the value of the Yen is rejected. Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707, 714 (9th Cir. 1992). Plaintiffs' attempt to amend the findings on pension contributions and retirement is rejected. Defendant Exportadora's attempt to use an alleged error in post-retirement compensation as an offset to damages is rejected. Plaintiffs' repeated request that this court affirm the jurisdictional ruling in Schoenberg v. Exportadora de Sal, 930 F.2d 777 (9th Cir. 1991), to "prevent Exportadora from arguing the opposite on appeal" is denied.

Dated this 5 day of May, 1993, at Anchorage, Alaska.

/s/
JAMES M. FITZGERALD
United states District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG, et al.,	)	Civil No. 88-1919-JLI
Plaintiffs,	)	MEMORANDUM DECISION
V.	)	AND ORDER
EXPORTADORA DE SAL, S.A. DE C.V a foreign corporation et al.,	)	[Filed June 29, 1989]
Defendants.	)	
HIROKO SUGIMOTO, et al.,	)	Civil No. 88-1920-JLI
Plaintiffs,	)	
v.	)	
EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,	)	
Defendants.	)	
DOREEN S. SCHOENBERG, et al.,	)	Civil No. 88-1530-JLI
Plaintiffs,	)	

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

CARMEN HERNANDEZ, et al.,

Civil No. 88-1531-JLI

Plaintiffs,

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

HIROKO SUGIMOTO, et al.,

Civil No. 88-1532-JLI

Plaintiffs,

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

This cause came on to be heard on July 5, 1989. Gerald Sterns, Robin Foor and Robert Aaron appeared on behalf of the plaintiffs. John Stephens appeared on behalf of defendant Exportadora de Sal, S.A. de C.V. ("Exportadora"). Having reviewed the oral and written arguments of the parties, the court hereby issues the following memorandum decision and order.

FACTS

These five actions arise out of the crash of a small aircraft in the United States as the aircraft approached the General Rodriguez International Airport in Tijuana, Mexico ("Tijuana Airport"). The plane was on route to Tijuana from Guerrero Negro, Baja California. Defendant Exportadora had chartered the plane from defendant Aviones De Sonora ("Aviones") to transport five passengers. On approach to Tijuana Airport through United States airspace, the plane encountered bad weather and struck the ground north of the United States/Mexican border. All five passengers and the pilot were killed. The plaintiffs in these cases are the passengers' survivors.

Exportadora is a corporation formed under the laws of Mexico and is 51% owned by defendant United Mexican States. Exportadora mines salt from the sea at Guerrero Negro and sells it on domestic and international markets. Guerrero Negro is two and one half hours by plane from Tijuana and is inaccessible except by air. Exportadora also has an office in San Diego that employs 10 persons and includes a large warehouse. The San Diego office handles the communications and shipping/transportation necessary for Exportadora's enterprise. Because Guerrero Negro had no telephone service, Exportadora is required to set up a telex between the two offices, and all communication between Guerrero Negro and the outside world is communicated through the San Diego office.

Exportadora maintains an air link between these two offices. An Exportadora corporate aircraft regularly flew

between Guerrero Negro and Tijuana Airport. To complete the trip to San Diego, an Exportadora van from the San Diego office would drop off or pick up passengers at the Tijuana Airport.

The decedents in these cases made their arrangements for transportation from San Diego to Guerrero Negro through the San Diego office, although the decisions to allow the passengers to travel aboard Exportadora's vehicles were made in Guerrero Negro. At the beginning of the trip, the passengers were picked up by the Exportadora van in San Diego and driven across the border into Tijuana for the flight south. Upon their return, the same van was to pick the passengers up at the Tijuana Airport and take them back to San Diego. The company plane was unavailable on the day of the return flight, so Exportadora hired Aviones to fly the passengers on their ill-fated trip to Tijuana.

The reasons the passengers visited Guerrero Negro vary. Mr. Schoenberg and Mr. Hernandez visited the salt mines allegedly to solicit orders for pumps produced by their employer, Berkeley Pump Corporation. Exportadora had previously purchased such pumps. Mr. Sugimoto and Mr. Kodani visited an agricultural station located next to Exportadora's facilities as representatives of Tottori University in Hamasaka, Japan. The Mexican Government requested that Exportadora transport them to Guerrero Negro and back. Mr. Omachi was a purchasing agent for Asahi Chemical Company of Japan. Asahi allegedly purchased a significant quantity of salt from Exportadora, and Omachi met with employees of Exportadora while in Guerrero Negro.

DISCUSSION

A. Foreign Sovereign Immunities Act

Exportadora contends that this court lacks subject matter jurisdiction over this case under the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. §§ 1330, 1602

et seq. The FSIA immunizes foreign states and their instrumentalities[1] from the jurisdiction of United States courts unless the matter falls into one of the statutory exceptions to immunity. If the claim does not fall within one of the enumerated exceptions, the court cannot entertain the action and must dismiss the action against the foreign state for lack of jurisdiction. Security Pacific National Bank v. Derderian, 872 F. 2d 281, 284-85 (9th Cir. 1989).

Under 28 U.S.C. § 1605(a)(2), the "commercial activity exception" to the FSIA, a foreign sovereign can be sued in actions which are:

> [1] based upon a commercial activity carried on in the United States by the foreign state; [2] or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity in the foreign state elsewhere and that act causes a direct effect in the United States.

Exportadora argues that none of these three predicates to the exception is present in these cases. The plaintiffs contend that all three predicates exist. This court finds these actions fall within the first predicate of the commercial activity exception and, therefore, this court concludes that it has subject matter jurisdiction under the FSIA.

B. Commercial Activity in the United States

In order to find that an action is based upon commercial activity carried on in the United States by foreign state, the court must determine if the activity is

---

[1]The FSIA governs corporations like Exportadora in which a foregn government has a majority interest. 28 U.S.C. § 1603(b).

indeed "commercial" and whether the activity resulted in "substantial contact" with the United States. 28 U.S.C. § 1603 (e). Moreover, the "FSIA requires that there be a significant 'nexus' between the cause of action and the 'commercial activity' carried on in the United States." Compania Mexican De Aviaction v. U.S. District Court, 859 F.2d 1354, 1360 (9th Cir. 1988). The commercial activity relied upon by the plaintiffs to establish jurisdiction must be the activity upon which the lawsuit is based. "The focus must be solely upon 'those specific acts that form the basis of the suit.'" American West Airlines v. GPA Group, No. 88-1657, slip op. 6193, 6200 (9th Cir. June 12, 1989) (quoting Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018, 1023 (9th Cir. 1987)).

1. Transportation of Passengers Was Commercial Activity

Exportadora's conduct in transporting the passengers from San Diego to Guerrero Negro was commercial activity. The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603 (d). The court is to look at the nature rather than the purpose of the activity in question. "Nevertheless, the purpose of an act may be relevant in defining its nature: "[o]ften, the essence of an act is defined by its purpose." Joseph at 1023 (quoting De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1393 (5th Cir. 1985)).

As part of its commercial operations, Exportadora maintained an air link between Guerrero Negro and San Diego, its two places of business. Exportadora usually employed its corporate aircraft for the Guerrero Negro to Tijuana portion of the journey, and it was a common practice for an Exportadora van to carry out the Tijuana to San Diego leg of the trip. This court finds that this general activity by Exportadora of providing a convenient and efficient means of connecting the two offices is commercial

activity by Exportadora.

Further, the specific purpose for which a majority of the passengers were aboard the aircraft was closely related to Exportadora's commercial enterprise. Mr. Schoenberg and Mr. Hernandez flew to Guerrero Negro to solicit business. They planned on selling water pumps to Exportadora which were to be used in Exportadora's mining operation. They did not arrive uninvited; Exportadora arranged and paid for their trip to Guerrero Negro. Mr. Omachi also flew down to Guerrero Negro at Exportadora's expense. The business reason for his trip is not clear, but apparently he was there as a purchaser of salt for his Japanese corporation.

As for the Japanese passengers from Tottori University, while it appears that their purpose in traveling to Guerrero Negro was not closely related to Exportadora's commercial activity, Exportadora's management transported these passengers at the request of the corporation's majority stockholder. This court finds it unnecessary to decide whether this request was based on commercial, political or charitable considerations. The management and shareholders of Exportadora obviously thought ferrying these researchers was appropriately within the corporation's purpose. It is enough that Exportadora acquiesced and transported these passengers as part of its routine activity of providing an air link between corporate offices.[2]

2. Transportation of Passengers in the U.S. Had Significant Nexus With These Causes of Action

Exportadora's transportation of the passengers within San Diego constituted activity in the United States. The issue is whether these causes of action have a significant nexus with this activity.

The circumstances of this case places it between Compania Mexicana De Aviacion v. U.S. District Court, 859 F.2d 1354 (9th Cir. 1988), and Sugarman v. Aeromexico, 626 F.2d 270 (3rd Cir. 1980). In Compania a group of Mexican nationals sued an airline owned by the Mexican government

for wrongful death based on a crash of a domestic Mexican flight shortly after takeoff from Mexico City. The plaintiffs sought to invoke the commercial activity exception to the FSIA. They argued there was a significant nexus between the cause of action and the defendant's commercial activity in the United States since the airline carried on commercial activity in the United States by having flights to the United States, and since the plane which crashed was in Chicago the day before and was eventually destined for Los Angeles. The court rejected this argument: "If this is a sufficient nexus, all airline crashes by government-owned carriers that stop in the United States would fall within the jurisdiction of the United States. Such a result is not compatible with either the FSIA or the Warsaw Convention." Id. at 1360. The present case is distinguishable from Compania. Although both cases deal with a foreign corporation flying persons from one Mexican city to another, in this case there is ground transportation to and from San Diego and the

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[2]At oral argument Exportadora for the first time characterized its activity of transporting the Tottori University passengers as governmental conduct. It cited Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980). In Arango the plaintiffs were "involuntarily rerouted" after arriving in the Dominican Republic on the government-owned airline "Dominicana." Dominican immigration officials ordered the expulsion and "impressed" Dominicana to carry it out. The court held Dominicana's actions were governmental in nature since it acted "merely as an arm or agent of the Dominican government . . . ." Id. at 1379.

Arango does not apply. There is no evidence the Mexican government "impressed" Exportadora pursuant to Mexican law to transport the Tottori University passengers. The record only shows that Exportadora periodically assisted the agricultural project upon "instructions" from the Mexican government. Further, Arango involved official acts by immigration officers which are activities "only a sovereign state can perform." Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018, 1024 (9th Cir. 1987). The instruction of the government of Mexico was the command of a majority shareholder to the corporation that any private majority shareholder could give and is not the mark of a state acting in its sovereign capacity.

passenger's arrangements for the trip through Exportadora's San Diego office. These factors create a more substantial nexus than existed in Compania.

The Sugarman case, like the Compania case, concerned foreign air travel. The plaintiff in Sugarman alleged that a delay at the Acapulco airport before the departure of his Aeromexico (a government-owned carrier) flight back to Newark caused him health problems. The court found the fact that the delay took place on a leg of a round trip to the United States and the fact that the plaintiff bought his tickets in the United States, established a sufficient nexus between the acts which gave rise to the action and the carrier's commercial activity in the United States. Id. at 273.

The only distinction between Sugarman and the present case is that part of the trip in the present case was by Exportadora's van and in the present case the "carrier" was forced to charter the return flight due to the unavailability of its own aircraft. These distinctions are not significant.

C. CONCLUSION

This court finds that these actions are based upon commercial activity by a foreign state in the United States. Exportadora is not immune under the FSIA and its motion to dismiss is denied.[3]

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[3]This court notes, without deciding, that it is probable that the third predicate to the commercial activity exception also applies in these cases. These cases are based on commercial activity outside of the United States which caused a substantial effect in the United States. There is no doubt that one aspect of Exportadora's commercial activities -- the air crash -- had a substantial effect in the United States. The issue is whether this effect was sufficiently direct and foreseeable. Derderian at 286. Since Exportadora regularly flew into Tijuana Airport which utilizes United States' airspace and since Exportadora arranged transportation between Guerrero Negro and San Diego, such an effect would appear to be foreseeable.

IT IS SO ORDERED.

DATED: JUNE 28, 1989

/s/
J. LAWRENCE IRVING, JUDGE
UNITED STATES DISTRICT COURT

COPIES TO:

ALL COUNSEL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG, et al.,	)	Civil No. 88-1919-JLI
Plaintiffs,	)	MEMORANDUM DECISION
V.	)	AND ORDER
EXPORTADORA DE SAL, S.A. DE C.V a foreign corporation et al.,	)	[Filed August 8, 1989] [Entered August 31, 1989]
Defendants.	)	
HIROKO SUGIMOTO, et al.,	)	Civil No. 88-1920-JLI
Plaintiffs,	)	
v.	)	
EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,	)	
Defendants.	)	
DOREEN S. SCHOENBERG, et al.,	)	Civil No. 88-1530-JLI
Plaintiffs,	)	

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

CARMEN HERNANDEZ, et al.,

Civil No. 88-1531-JLI

Plaintiffs,

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

HIROKO SUGIMOTO, et al.,

Civil No. 88-1532-JLI

Plaintiffs,

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

This cause came on to be heard on July 17, 1989.

Gerald Sterns, Robin Foor and Robert Aaron appeared on behalf of the plaintiffs. John Stephens appeared on behalf of defendant Exportadora de Sal, S.A. de C.V. ("Exportadora"). The United Mexican States ("UMS") appeared pro se; Miguel Angel Gonzales was present on its behalf. Having reviewed the oral and written arguments of the parties, the court hereby issues this memorandum decision and order.

FACTS

These factual findings contained in the court's previous Memorandum Decision and Order, dated July 5, 1989, are incorporated herein. These five actions, which the court ordered consolidated at the July 17 hearing, arise out of the crash of an aircraft as it approached the Tijuana Airport in Tijuana, Mexico. At the time of the crash, the aircraft was flying through United States airspace pursuant to a Letter Agreement ("Letter Agreement"), dated June 15, 1987, between the United States air traffic control facility in San Diego ("San Diego TRACON") and the air traffic control facility for Tijuana Airport ("Tijuana Approach"). The aircraft crashed just north of the border, killing all aboard.

The exact cause of the crash is in dispute. The plaintiffs allege that the Mexican controller in communication with the aircraft wrongfully urged the pilot to make an approach into Tijuana Airport despite the bad weather and the pilot's request for an alternative landing site. The plaintiffs also allege San Diego TRACON failed to take certain actions as allegedly required by the Letter Agreement. Most importantly, the plaintiffs contend that San Diego TRACON failed to assign a transponder or beacon code to the aircraft thereby preventing the San Diego TRACON air traffic control computers from generating a low altitude warning to alert the U.S. controllers that the aircraft was too low on its approach.

DISCUSSION

A. UMS' MOTION TO DISMISS UNDER THE FSIA

UMS contends that this court lacks subject matter jurisdiction over this case under the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. §§ 1330, 1602 et seq. The FSIA immunizes foreign states from the jurisdiction of United States courts unless the matter falls into one of the statutory exceptions to immunity. If the claim does not fall within one of the enumerated exceptions, the court cannot entertain the action and must dismiss the action against the foreign state for lack of jurisdiction. Security Pacific National Bank v. Derderian, 872 F.2d 281, 284-85 (9th Cir. 1989).

At issue in this motion is the non-commercial tort exception to the FSIA. This provision states in part that a foreign sovereign can be sued in actions:

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

28 U.S.C. § 1606(a)(5).

This exception has been construed as mandating not only that the injury take place in the United States, but that all of the tortious conduct making up at least one cognizable tort take place here as well. Olsen v. Government of Mexico, 729 F.2d 641, 646 (9th Cir. 1984). The D.C. Circuit has come to a similar conclusion concerning § 1605(a)(5): the entire tort must have taken place in the United States. Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1524 (D.C. Cir. 1984) (Scalia, J.); Persinger v.

Islamic Republic of Iran, 729 F.2d 835, 842 (D.C. Cir. 1984).

Olsen was case much like this one. A plane owned and operated by the Mexican government crashed in the United States on approach to Tijuana Airport. As in this case, there were many alleged causes of the accident including the negligence of the pilot, improper aircraft maintenance and the negligence of the Mexican and United States controllers. Olsen at 645-46.

UMS claimed in Olsen that there was no subject matter jurisdiction under the FSIA. Citing Matter of SEDCO, 543 F. Supp. 561, 567 (S.D. Tex. 1982), UMS contended that section 1605(a)(5) requires all of the tortious conduct to occur in the United States before a foreign state will be denied immunity. UMS noted that some of UMS' allegedly tortious acts or omissions took place outside the United States--such as the maintenance of the aircraft and an inoperative radar at Tijuana airport. Under the reasoning of SEDCO, argued UMS, the noncommercial tort exception did not apply.

The Ninth Circuit rejected this argument:

> By requiring every aspect of the tortious conduct to occur in the United States, a rule such as in SEDCO would encourage foreign states to allege that some tortious conduct occurred outside of the United States. The foreign state would thus be able to establish immunity and diminish the rights of injured persons seeking recovery . . . . Consequently, we hold that if plaintiffs allege at least one entire tort occurring in the United States, they may claim under section 1605(a)(5). In this case, the appellants allege conduct constituting a single tort -- the negligent piloting of the aircraft -- which occurred in the United States. We are satisfied that appellants have alleged sufficient conduct occurring in the United States to bring this case within the non-commercial torts exception as expressed in § 1605(a)(5) and its legislative history.

Olsen at 646.

It is the clear holding of Olsen that in order for a plaintiff to establish jurisdiction over a foreign sovereign under § 1605(a)(5) of the FSIA, the plaintiff must prove the foreign sovereign committed at least one entire tort in the United States. As a necessary corollary a plaintiff at a minimum, must establish that the foreign state took some wrongful action in the United States. See Asociacion de Reclamantes, 735 F.2d at 1524; Persinger 729 F.2d at 842.

In this case, defendant UMS makes a simple argument: since it is not alleged that it engaged in any conduct in the United States, Olsen requires a finding that subject matter jurisdiction does not exist under the FSIA. In Olsen the Mexican government owned the plane and its agents flew it. The alleged wrongful operation of the plane by employees of the Mexican government in United States airspace constituted an entire tort occurring in the United States. In this case, argues UMS, the plane was operated by a private company and the only action the Mexican government undertook was controlling the plane through United States airspace. This alleged wrongful conduct occurred in Mexico. Thus, UMS contends, § 1605(a)(5) does not apply and there is no jurisdiction.

The plaintiffs bring essentially three contentions against UMS' argument.

1. U.S. Controllers Acted As Agents Of Mexico

The non-commercial tort exception applies if the wrongful act or omission is performed by any official or employee of the foreign state while acting within the scope of employment. Thus, the exception invokes the doctrine of respondeat superior. Skeen v. Federative Republic of Brazil, 566 F. Supp. 1414, 1417 (D.D.C. 1983). The court should look to state law to determine the existence and scope of the employment or agency. Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018, 1025 (9th Cir. 1987).

The plaintiffs allege that as the aircraft approached

the Tijuana Airport San Diego TRACON was acting as an agent of UMS pursuant to the Letter Agreement. The plaintiffs claim that San Diego TRACON wrongfully failed to act in four ways: 1) it failed to approve the flight's entering into U.S. airspace; 2) it failed to individually co-ordinate with the flight; 3) it failed to issue a specific transponder code; and 4) it failed to assign a radar point out. San Diego TRACON was allegedly required to perform all of these actions under the Letter Agreement. UMS argues on the contrary that the Letter Agreement created no agency relationship between the two governments.

"An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called an agency." Cal. Civ, Code § 2295. The most significant factor tending to show agency or employment is the right of the principal or employer to control the details of the work, Tieberg v. Unemployment. Insurance. Appeals. Board., 2 Cal. 3d 943, 950 (1970); and conversely, freedom from such control tends to establish the relationship of independent contract. Green v. Sole, 145 Cal. 96 (1904). It is not the control actually exercised, but that which may be exercised (the right of control) which determines the issue of employment or independent contract relationship. 1 Witkins, Summary of California Law, pg. 651. Besides the right of control, California courts have identified the following factors to use in analyzing whether a person is an agent or an independent contractor:

1. Does the alleged agent have a distinct occupation, does he work outside of the alleged principal's premises, and is he paid a salary or piecemeal?

2. Does the agreement's language imply the principal's right of control over the details of the relationship?

3. Does the agent own the instrumentalities of his occupation and are these tools of substantial value?

4. What are the parties beliefs as to their relationship?

Tieberg at 950-54; see also Restatement Second of Agency,

§220 (for similar list).

Applying these factors to the relationship between San Diego TRACON and the Mexican government, it is clear that San Diego TRACON was not an agent of the Mexican government. The most important factor is UMS' right of control over the details of San Diego TRACON's operations. The Letter Agreement indicates that Mexico had no meaningful right of control over TRACON's operations. The agreement specifies certain actions that both Tijuana Approach and San Diego TRACON are to take in coordinating the transfer of flights arriving and departing Tijuana Airport through U.S. airspace. Nowhere in the agreement does it state or imply, apart from the specific instructions in the Letter Agreement, that Mexico can dictate to San Diego TRACON anything related to its operations. Indeed, it does not even appear that Mexico can require San Diego TRACON on a flight-by-flight basis to approve the use of the U.S. approach. Mexico must seek approval for each aircraft prior to commencing approach.

Even the specific action that the plaintiffs allege San Diego TRACON failed to perform are not required by the language of the Letter Agreement. San Diego TRACON is not required to approve flights requesting the use of United States airspace. See Letter Agreement, Para. 4(b). Tijuana Approach, and not San Diego TRACON, has the obligation of "individually co-ordinating" flights. Id. Further, Tijuana Approach is to advise each aircraft of the transponder code, Id., Para. 4(c)(2), but there is nothing in the agreement which says that San Diego TRACON is required to provide such a code. Finally, Tijuana Approach, not San Diego TRACON, is required to "accomplish a radar point-out to San Diego TRACON prior to crossing the border." Id., Para. 4(c)(2). The Letter Agreement does not give to Tijuana Approach any control over the operations of San Diego TRACON.

The other factors used to determine agency also lead the court to conclude that San Diego TRACON was not an agent of Mexico. There is no evidence that the United

States controllers are paid by the Mexican Government for these services. The United States controllers use their own, presumably expensive, instruments and do not perform their duties in Mexican facilities. Finally, there is little evidence of what the alleged agents and principal believed their relationship to be, but the evidence introduced suggests the San Diego TRACON personnel did not feel it was their responsibility to guide aircraft destined for Tijuana Airport; indeed, it was rare that they would even speak with them over the radio. Canfield Deposition at 50-51. See also, Vaughn Deposition at 60, 63; Bowen Deposition at 31.

In short, the Letter Agreement does not provide for San Diego TRACON to act as the controller for flights approaching Tijuana Airport through United States airspace. It does not even provide that San Diego TRACON is to assist Tijuana Approach in its duties. Instead, the procedures are prudent safety measures apparently designed to allow Mexico to use this portion of United States airspace without causing confusion for United States controllers or other aircraft using the space. As UMS points out, if anything the agreement suggests that it is the U.S. government who gives authorization to Mexico for how they are to use United States airspace. Therefore, the court finds that there is no agency relationship between the Mexican government and San Diego TRACON.[1]

2. Entire Tort Occurred In U.S.

In various ways, the plaintiffs argue that the whole tort allegedly committed by the Mexican controller took place in the United States.

The plaintiffs first argue that UMS violated United States law by wrongfully controlling an aircraft in U.S. airspace. The plaintiffs cite law to establish that if the Mexican controller was controlling an aircraft from a United States control tower, he and the United States could be liable for his wrongful conduct. This argument does nothing to establish that UMS committed at least one entire tort in

the United States. At most it shows that the Mexican controller may have violated United States law.

The plaintiffs also argue that under California law a tort occurs where the last event necessary to make the defendant liable takes place. Southern Arizona York Refrigeration Co. v. Bush Mfg. Co., 331 F.2d 1 (9th Cir. 1964). However, in Southern Arizona the issue was which forum's law applied, not what constitutes an entire tort under the FSIA. Moore v. Greene, 431 F.2d 584 (9th Cir. 1970), the other case plaintiffs cite for this purpose, also involved a conflict of laws issue. It is not on point because the court in Moore did not determine where the tort occurred; but only determined which forum had more of an interest in having its law applied to the incident. Id. at 589.

Finally, the plaintiffs argue that under California law a person can be liable for inciting dangerous activity over the radio. Weirum v. R.K.O. General, Inc., 15 Cal.3d 40 (1975). The plaintiffs' citation of this case does not help them circumvent the crucial fact: UMS committed no act,

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[1]The Fourth Proposed Amended Complaint contains the allegation that TRACON was the agent of the Mexican government. Normally, on a motion to dismiss the allegations in the complaint are accepted as true. However, both sides have introduced affidavits which converts this motions into a motion for summary judgment. F.R.C.P. Rule 12(b).

The plaintiffs contend that the existence of an agency is a question of fact, 1 Witkins, Summary of California Law, pg. 701, and presumably contend that the issue is one which must be resolved at trial. However, a question of fact does not prohibit this court from ruling upon UMS' motion at this time. The FSIA requires that UMS be given a court trial. 28 U.S.C. sec. 1330(a); Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1531-35 (11th Cir. 1985). There is nothing that has been submitted to the court on this issue which necessitates the hearing of live testimony. The parties also have not indicated that they have any further evidence to present on the subject. Furthermore, because the subject matter jurisdiction of the court is at issue, it is "essential" that questions of foreign sovereign immunity be determined as a preliminary matter. Security Pacific National Bank v. Derderian, 872 F.2d 281, 283 (9th Cir. 1989).

wrongful or otherwise, in the United States. The Mexican controller may have incited the pilot to crash his plane, but he did this while in Mexico.

3. Congress Intended This Type of Accident To Be Within Exception

The Plaintiffs argue that Congress intended for federal courts to have jurisdiction over foreign states involved in accidents such as this one. They argue that Congress took into account the strong policy considerations of deterring negligent conduct and compensating victims when it created the noncommercial tort exception and that these policies are forwarded by applying the exception to the facts of this case.

The purpose of the noncommercial tort exception is "to permit the victim of a traffic accident or other non-commercial tort to maintain an action against the foreign state to the extent otherwise provided by law." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976) 16, 21, 1976 U.S. Code Cong. & Admin. News, 6604, 6620. The House Report states that the exception is "directed primarily at the problem of traffic accidents . . . ." Id. at 6619. The legislative history does not specifically refer to a congressional policy of deterrence or compensation underlying the rule, although it can be presumed that Congress wished to provide a domestic remedy for those injured by a foreign state's conduct in the United States. See Persinger at 840 (giving local citizens effective redress in U.S. courts as one purpose behind the exception).

The plaintiffs describe this incident as merely another type of traffic accident. Accepting plaintiffs' characterization does not circumvent the difficulty that all of the alleged wrongful conduct by UMS which led to this accident occurred outside of the United States. The plaintiffs' argument ignores other aspects of the legislative history which have lead courts to find that Congress intended section 1605(a)(5) to apply only to wrongful conduct by the foreign state committed in the United States. Id. This congressional

intent deserves the same consideration as an alleged intent to deter and compensate. In any case, legislative history cannot prevent the court from following the law of this circuit.

B. CHOICE OF LAW

Defendant Exportadora argues that Mexican law limiting damages for wrongful death should apply in this case. The plaintiffs contend that California law applies. Under Mexican law, damages for death in aircraft accidents is limited to "an amount equal to the minimum salary of six thousand seven hundred and eighty days." Article 342, First Section Chapter XIII of the Federal Law of General Ways, Declaration & Affidavit of Zack V. Chayet, Exhibit 2. California has no limit on the amount which can be recovered in a wrongful death suit.

It is not disputed that California's choice of law rules govern this issue. California courts have applied a "comparative impairment" approach to choice of law questions. In this approach courts first endeavor to discover if there is a "true conflict": whether each state has an interest in having its rule of decision applied. Bernhard v. Harrah's Club, 16 Cal. 3d 313, 319 (1976). If a true conflict exists, California courts then seek "to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. This analysis proceeds on the principle that true conflict should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied." Id. at 320.

There is a true conflict in this case. Mexico has an interest in seeing that the policy of limiting damages for wrongful death is applied to its citizens; arguably in promulgating the law, the Mexican government sought to protect defendants like Exportadora from large damage claims arising from its activities. See Hurtado v. Superior Court, 11 Cal. 3d 574, 583 (1974). California has two interests here: 1) the deterrence of wrongful conduct inside

its borders, and 2) compensating the plaintiffs who are California residents for the injuries they suffered. Id. at 584.

Having determined there is a true conflict, the court must seek to determine the relative commitment by each state to having its rule of decision applied to the case at hand.

As to the plaintiffs who are California residents, the court finds that California case law is dispositive. In Hall v. University of Nevada, 74 Cal. App. 3d 280 (1977), plaintiffs sued the state institution claiming that an employee of the University of Nevada, while on official business, collided with the plaintiffs' vehicle. The accident took place in California and the plaintiffs were California residents. Nevada limited the amount of money that could be collected from state entities in personal injury actions: $25,000 per person. Nevada sought to have that limitation apply under California's choice of law rules.

The Hall court examined the conflicting interests of the states and held that the Nevada limitation did not apply.

> In the instant case Nevada advances as its policy, the fact that if its liability were not limited, its residents would suffer financially, due to the increased cost of insurance for Nevada vehicles being operated outside of the state. California's policy interest lies in providing full protection to those who are injured on its highways through the negligence of both residents and nonresidents.

Id. at 285-86.

The same reasoning applies to this case. California has an interest in making its airspace safe. It also has an interest in compensating its resident survivors. In having its corporations transport passengers in California airspace, Mexico should fully expect to be held accountable under California law.

Exportadora argues that the comparative impairment analysis in this case differs from that in Hall. As noted

above, in determining which law to apply, comparative impairment analysis requires the court to determine the relative commitment of the respective states to the laws involved. This includes examining whether "the same policy may easily be satisfied by some means other than enforcement of the statute itself." Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 166 (1978). The Offshore court gave as an example the feasibility of the purchase of insurance by tort victims as another means of fulfilling a statute designed to compensate tort victims. "The fact that parties may reasonably be expected to plan their transactions with insurance in mind may therefore constitute a relevant element in the resolution of a true conflict [of laws]." Id. See also Bernhard v. Harrah's Club, 16 Cal. 3d 313, 323 (1976) (Nevada's interest in protecting its tavern owners from liability for selling alcohol to intoxicated persons could be forwarded by buying insurance against California residents who become involved in accidents after drinking in Nevada bars).

The Hall court based its decision in part on the ability of the State of Nevada to purchase additional insurance for its activity in California. The court said that this was a reasonable and foreseeable expense which would satisfy Nevada's interest in not being exposed to significant liability. Hall at 286.

Distinguishing Hall, Exportadora argues that it was relatively unforeseeable that the transporting of these passengers would have any connection with California. It could not have anticipated the need to buy insurance so consequently there is not easy alternative means of forwarding Mexico's interest in limiting the severe economic impact of large damage awards on its residents. On the other hand, Exportadora argues that the decedents voluntarily travelled to Mexico and could have easily purchased insurance to satisfy California's interest in securing compensation for its residents.

The court does not find Exportadora's argument convincing. It is foreseeable that an accident could happen

in California arising out of the transportation of these passengers.[2] Further, Exportadora, as a business with offices in California, was in a better position to protect Mexico's interest in protecting residents from large damage awards than the plaintiffs, as the survivors of the deceased, were in protecting California's interest in ensuring their compensation. Finally, Exportadora does not suggest how California's interest in deterring wrongful conduct is satisfied by means other than applying unlimited damages. Therefore, Mexico's limitations on damages should not apply to the California plaintiffs.

California's interest in seeing its wrongful death law applied is not as great for the group of Japanese plaintiffs, the Argentine plaintiff and for the plaintiff who resides in New York.[3] A failure to apply California's unlimited recovery law to the out-of-state plaintiffs obviously does not impair California's interest in seeing its residents compensated, but it does impair California's interest in deterring wrongful conduct.

As to the out-of-state plaintiffs, the court finds that California's interest in this case is more likely to be impaired by a failure to apply its law than is Mexico's interest by a

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[2]The parties dispute the frequency in which United States airspace was used by aircraft in approaching Tijuana Airport. Resolving this dispute is unnecessary. As the court found in its July 5, 1989, Memorandum Decision and Order, Exportadora arranged for round trip transportation between Guerrero Negro and San Diego. It was entirely foreseeable to Exportadora that passengers could be injured in the United States on a trip to the United States.

[3]Exportadora argues that California has no interest in such a case, relying upon Reich v. Purcell, 67 Cal 2d 551 (1967). However, the California Supreme Court in Hurtado specifically rejected this reading of Reich, Hurtado at 582. Instead, the court found that "one of the primary purposes of a state in creating a cause of action in the heirs for the wrongful death of a decedent is to deter the kind of conduct within its borders which wrongfully take a life." Id. at 583.

failure to apply Mexican law. As noted above, Exportadora can protect Mexico's interest by purchasing insurance. But there is no such easy alternative available to California to ensure that foreign corporations transport passengers safely within its territory.

Further, even if the court found California's and Mexico's commitments to be equally strong, the result would probably not differ. California courts have not yet confronted a situation where, under the comparative impairment analysis, the states' interests were found to be equal. In such a situation, it is likely that the courts would use either the old rule of lex loci delecti or create a blanket rule that the law of the forum applies. See In Re Aircrash Disaster Near Chicago, Illinois, 644 F. 2d 594, 626 (1981). In either instance, California law applies.[4]

ORDER

1. Defendant United Mexican States' motion to dismiss for lack jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, 1602 et seq., is granted.

2. Defendant Exportadora de Sal's motion for partial summary judgment is denied. California's rule of decision regarding damage awards in wrongful death actions applies as to all of the plaintiffs.

IT IS SO ORDERED.

DATED: August 7, 1989.

/s/
J. LAWRENCE IRVING, JUDGE
UNITED STATES DISTRICT COURT

COPIES TO:
ALL COUNSEL

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[4]The court's decision as the choice of law question is limited to the arguments and parties before the court.

[Filed May 7, 1993]
[Entered May 11, 1993]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, et al.,	)	
	)	Civil No. 88-1532R(POR)
Plaintiffs,	)	Consolidated
	)	Civil No. 88-1920R(POR)
vs.	)	
	)	
EXPORTADORA DE SAL, S.A. DE C.V., a foreign corporation, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

These cases were tried before the Court without a jury, the Honorable James M. Fitzgerald presiding. The issues have been tried or heard and a decision has been rendered. Defendant Aviones De Sonora, S.A. has been served with the complaints, has failed to respond to the complaints, and default has been entered against it.

IT IS ORDERED AND ADJUDGED that damages are awarded against defendant Exportadora De Sal, S.A. De C.V., and against defendant Aviones

De Sonora, S.A., jointly and severally, and in favor of plaintiffs as follows:

1. In favor of plaintiff Hiroko Sugimoto for $617,779.00, less an offset of $40,329.07, in the amount of $577,449.93;

2. In favor of plaintiff Kimiko Kodani for $1,093,489.00, less an offset of $40,329.07, in the amount of $1,053,159.53;

3. In favor of plaintiff Kuniko Omachi for $2,066,472.00, less an offset of $40,329.07, in the amount of $2,026,142.93.

4. In favor of plaintiffs Hiroko Sugimoto, Kimiko Kodani, Kuniko Omachi, Mayumi Nukiwa, and Eri Omachi for costs.

Enter the judgment.

Dated this 5 day of May, 1993, at Anchorage, Alaska.

/s/
JAMES M FITZGERALD
United states District Judge

U.S.DEPARTMENT OF COMMERCE

[Exhibit 12-6, excerpt.]

Washington, October 27, *19* 92

I HEREBY CERTIFY that the annexed is a true copy of Terminal Forecasts (FTs) and FT Amendments for Mexico, valid during the periods beginning 0600Z and 1800Z September 28, 0600Z and 1800Z September 29, and 0600Z and 1800Z September 30, 1987; and hourly and special weather reports for Mexico, during the period from 0000Z September 28, to 2359Z September 30, 1987, inclusive

on file in the Aviation Services Branch, National Weather Service Headquarters, Silver Spring, Maryland

Robert Kuessner
Aviation Safety and Evaluations Program Leader
National Weather Service
(Official Title)

I HEREBY CERTIFY that Robert Kuessner *who signed the foregoing certificate, is now, and was at the time of signing,* Aviation Safety and Evaluations Program Leader *and that full faith and credit should be given his certificate as such.*

In WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 27th *day of* October, *one thousand nine hundred and* ninety-two.
For the SECRETARY OF COMMERCE:

J.Marilee Bright
Chief, Executive Affairs
National Weather Service
Certifying Officer

*** SRRS PRODUCT RETRIEVAL ***
FOR
09/30/87 0000 UTC TO 09/30/87 2359 UTC

FTMZ2 MMMX 300500
TIJ 300606 15MNU 4HK TEMPO C15NUB. 11Z 10MNU 4FH TEMPO C10NUB 2FH. 15Z DSP 5HK 2410. 19Z DSP 2512 . .
MXL 300606 260MNU. 17Z 260MNU 2410. 04Z DSP . .
HMO 300606 DSP. 17Z DSP 2312. 03Z DSP . .
GYM 300606 DSP. 17Z DSP 2312. 03Z DSP . .
CEN 300606 DSP. 17Z DSP 1810 OCNL 30MNU. 03Z DSP . .
LTO 300606 DSP. 17Z DSP 1210. 03Z DSP . .
MMO MEX GN . .
FTMX2 MMMX 301700
TIJ 301818 DSP 3010.03Z DSP 3HK OCNL 12MNU.08Z C3X 1/2F.16Z 5MNU 3H . . .
MXL 301818 40MNU 0410.03Z DSP . . .
HMO 401818 DSP 1610 OCNL 20/23Z 30MNU.04Z DSP. . .
GYM 301818 DSP 2010 OCNL 30MNU.21Z 30MNU 2015 OCNL C30NUB. OCNL 23/04Z 5T.06Z DSP . .
CEN 301818 DSP 2010 OCNL 30MNU.21Z 30MNU 2015 OCNL 00/06Z 5T.08Z 100MNU C200NUB . .
LTO 301818 25MNU 10909MNU C200NUB 1210 TEMPO 23/04Z C15NUB OCNL 5T . . .
06Z 25MNU C9NUB 200NUB . .
MMO/MEX/RS.
FTMX2 MMMX 301430
TIJ AMD1 300606 1430Z C9X 0X TEMPO 1X.15Z C5X 1/2F.16Z 5MNU 3HK.18Z DSP 3101. 03Z DSP 3HK OCNL 12MNU . .
MMO/MEX/RS.
FTMX2 MMMX 302130
LTO AMD1 301818 2130Z DSP 0810 OCNL 25MNU.23Z 25MNU 200MNU 1210.

04Z DSP.10Z 100MNU C200NUB 1210 OCNL
DSPS 16Z 20MNU . .

[Emphasis added.]

[Exhibit 12-1, excerpt.]

U.S.DEPARTMENT OF COMMERCE

Washington, December 18 , *19* 92

I HEREBY CERTIFY that the annexed is a true copy of Aviation Area Forecasts (FAs) for the Pacific Coast Area prepared by the National Severe Storms Forecast Center at Kansas City, Missouri, valid during the periods beginning 0245Z and 1045Z September 30, 1987; Terminal Forecasts (FTs) and FT Amendments for San Diego, California, prepared by the Los Angeles, California, Forecast Office valid during the periods beginning 0200Z, 1000Z, and 1900Z September 28, 29, and 30, 1987; and hourly and special weather reports for San Diego (Brown Field), during the period from 0000Z to 2359Z September 30, 1987, inclusive

on file in the Aviation Services Branch, National Weather Service Headquarters, Silver Spring, Maryland

Robert Kuessner
Aviation Safety and Evaluations Program Leader
National Weather Service
(Official Title)

I HEREBY CERTIFY that Robert Kuessner *who signed the foregoing certificate, is now, and was at the time of signing,* Aviation Safety and Evaluations Program Leader *and that full faith and credit should be given his certificate as such.*

In WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this

18th *day of* December, *one thousand nine hundred and* ninety-two.
For the SECRETARY OF COMMERCE:

J.Marilee Bright
Chief, Executive Affairs
National Weather Service
Certifying Officer

*** SRRS PRODUCT RETRIEVAL ***
FOR
09/30/87 0000 UTC TO 09/30/87 2359 UTC

TTAA00 KLAX 300138
SAN FT 300202 CLR 3008. 08Z CLR 6H OCNL C8 BKN 4F. 16Z -X 4H. 20Z VFR . .
TTAA00 KLAX 300244
SAN FT 300202 CLR 3008. 08Z CLR 6H OCNL C8 BKN 4F. 16Z -X 4H 20Z VFR . .
TTAA00 KLAX 300821 AMD
SAN FT AMD 1 300802 0820Z -X C2 BKN 2F OCNL -X 4F. 18Z 120 SCT 250 SCT 3010. 20Z VFR NO CIG. .
TTAA00 KLAX 300933
SAN FT 301010 C2 X 1/2F OCNL -X C2 BKN 2F. 18Z 120 SCT 250 SCT 3010. 04Z VFR. 08Z MVFR F . .
TTAA00 KLAX 301518 AMD
SAN FT AMD 1 301510 1520Z C5 OVC 11/2F OCNL-X 7 SCT 3FH. 18Z 120 SCT 3010 VSBY 5H TIL 20Z. 04Z VFR. 08Z MVFR F . .
TTAA00 KLAX 301834
SAN FT 301919 120 SCT WND 3010 TIL 02Z. 08Z -X 3 SCT 120 SCT 4FH OCNL C3 X 1/2F AFT 10Z. 13Z LIFR CIG F. 17Z MVFR H . .

[Emphasis added.]

JEPPESEN JUL 31-87 (11-1)

TIJUANA, MEXICO

GEN ABELARDO L RODRIGUEZ INTL

ILS DME Rwy 09

LOC 111.5 ITIJ

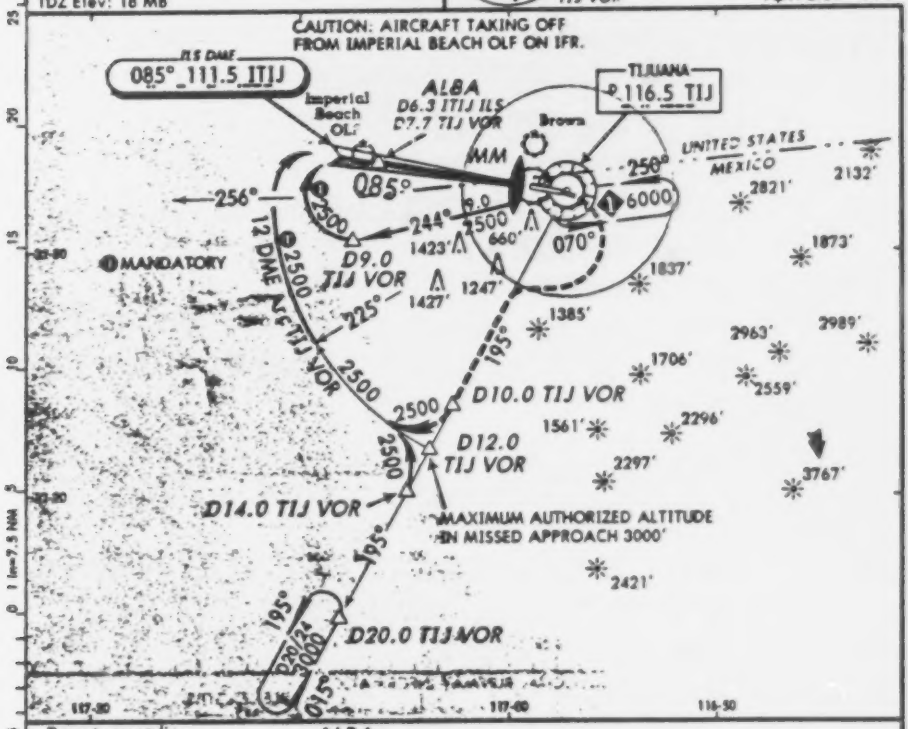
Apt. Elev 499'

•TIJUANA Approach (R) Below 20,000' 119.5
20,000' & Above 120.3
•TIJUANA Tower 118.1

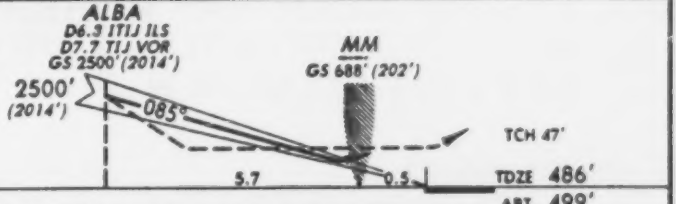
Alt Set: MB (IN on req)
TDZ Elev: 18 MB

070° 250° 3400' 5200' MSA TIJ VOR

CAUTION: AIRCRAFT TAKING OFF FROM IMPERIAL BEACH OLF ON IFR.



Do not use radio altimeter due to orographic conditions.



MISSED APPROACH: Climb to 1500', turn RIGHT and climb to intercept outbound TIJ VOR R-195, continue on R-195 to intercept the 12 DME ARC or hold between D20.0 and D24.0.

STRAIGHT-IN LANDING RWY 09	ILS	LOC (GS out)	CIRCLE-TO-LAND
	DH 736' (250') ALS out	DH 786' (300') MM out	MDA 840' (354')	MDA
A	RVR 1200m or ¾	RVR 1200m or ¾	RVR 1600m or 1	A 1200' (701')-1
B				B
C				C 1200' (701')-2
D		RVR 1600m or 1		D 1200' (701')-2¼
A-B-C-D	DH 786' (300') RVR 1600m or	DH 836' (350') RVR 1600m or	RVR 2000m or 1¼	

Gnd speed-Kts	70	90	100	120	140	160
GS 3.00°	379	487	541	649	757	866
ALBA to MAP 6.2	5:19	4:08	3:43	3:06	2:39	2:20

CHANGES: See other side.

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TIJUANA, MEXICO MMTJ (11-1) JUL 31-87 JEPPESEN

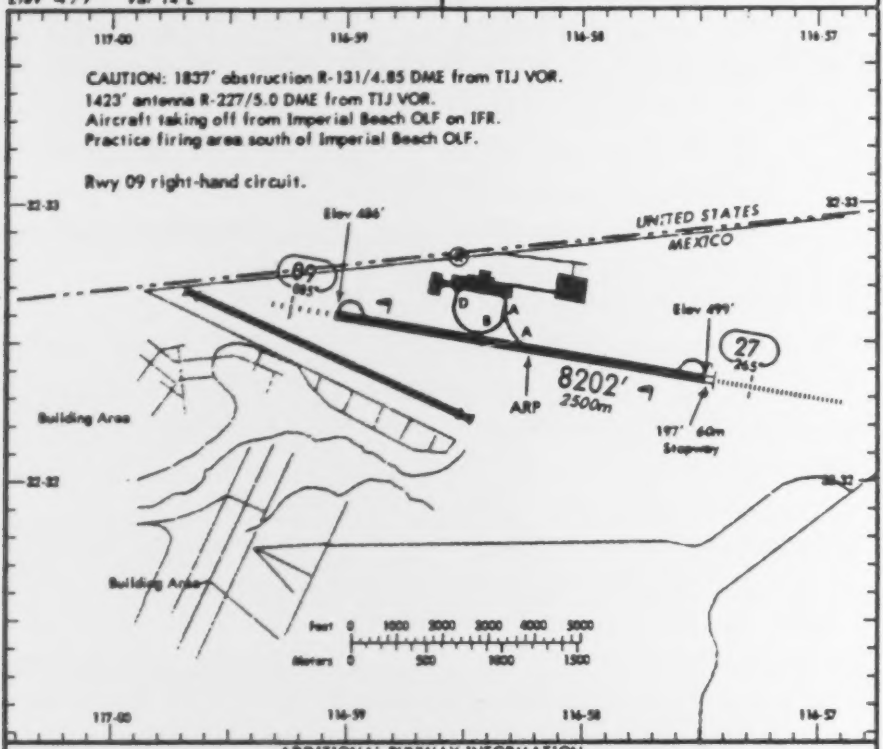
GEN ABELARDO L RODRIGUEZ INTL

N32 32.5 W116 58.3

Elev 499' Var 14°E

•TIJUANA Clearance 122.1

•Tower 118.1



ADDITIONAL RUNWAY INFORMATION

RWY						USABLE LENGTHS — LANDING BEYOND — Threshold	Glide Slope	TAKE-OFF	WIDTH
09	HIRL	MALS	❶ AVASI-L	RVR					144' 44m
27	HIRL	ALSF-I	❷ AVASI-L						

❶ Upwind angle 3.5°, downwind angle 3.0°.

❷ Use only within 5 NM, upwind angle 3.5°, downwind angle 3.0°.

TAKE-OFF & DEPARTURE PROCEDURE

	Rwy 27	Rwy 09
1 & 2 Eng	200-½	1600-2
3 & 4 Eng		

FOR FILING AS ALTERNATE

	Precision	Non-Precision
A	600-2	1600-3
B		
C		
D		

DEPARTURE PROCEDURE: Rwy 09, (Restricted to 200 Kt IAS Max). Climb on runway heading crossing D3.0 at 1800' or above, then intercept TIJ VOR R-250, at D8.0 teardrop turn to the LEFT to TIJ VOR to MCA for departing the station.

NOTE: This procedure requires a minimum climb gradient of 385' per NM until reaching 2100'. Rwy 27; intercept TIJ VOR R-250 and proceed with teardrop turn to the LEFT within 10 NM to the MCA for departing the station. CAUTION: Aircraft taking off from Imperial Beach OLF on IFR. Practice firing area south of Imperial Beach OLF. Departure MCAs: V-5 to MXL, J-3 & V-3 to PPE, J-5 to HMO 5000'; J-1 & V-99 to SQN 4100'; J-1 to MZB 3700'.

CHANGES: Rwy 27 take-off visibility, V-59 MCA added.

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[Exhibit 33]

SAN DIEGO POLICE DEPARTMENT
INVESTIGATOR'S REPORT

DATE (occurr.): September 30, 1987
TIME (occurr.): 0756 Hours
LOCATION: Otay Mesa "The Soccer Field"
SUBJECT: Aircraft Accident

On Wednesday, September 30, 1987, a Cessna 340 with Mexican Registration XS-KOA was on an ILS approach to the Tijuana International Airport. The aircraft was enroute to Tijuana from Guerrero Negro, Baja California, Mexico with six (6) persons on board. At 0756 hours, the Tijuana Tower lost radar and radio contact with the aircraft approximately one and a-half (1.5) miles west of the airport. Tower controllers notified United States authorities and the United States Border Patrol began a search of the area. At approximately 0816 hours, the Border Patrol located the wreckage in an area one and a-half (1.5) miles from the runway and one hundred (100) yards north of the International Border on a hillside just above the area known as "The Soccer Field". All six (6) passengers were dead.

Brown Tower, the nearest F.A.A. facility, reported the following weather conditions:

0748 -X 70 SCT 130 SCT 3/4F
0825 SPCL WOX 1/16 F

The aircraft is owned by Aero Servicios de Sonora, Hermosillo, Baja California, Mexico.

The pilot was Captain Raul GUADALUPE GUTIERREZ TELLEZ. He had a Mexican pilot certificate, number 734, with a commercial multi-engine instrument rating. His

medical certificate will expire December of 1987.

The passengers were three (3) Japanese businessmen and two (2) Americans:

1. Dr. Katsuo SUGIMOTO	About Fifty-five (55) Years,
2. Dr. Yoshihito KODANI	Sixty-five (65) Years,
3. Mr. Hideo OMACHI	Forty-one (41) Years,
4. Mr. Manuel HERNANDEZ	Fifty-one (51) Years, Oakland, California,
5. Mr. Ramon SCHOENBERG	Fifty-nine (59) Years, Oakland, California.

Initial indications were the plane was attempting to execute an approach in dense fog. The aircraft appeared to have impacted the terrain on its left underside before losing its left wing and lower left fuselage. After striking the ground, the aircraft appeared to have cartwheeled, throwing the four (4) rear passengers from the aircraft and scattering debris over a hundred (100) yard area. The aircraft was a total loss.

Additional personnel at the scene:

1. Mr. Dan MATTICKS, Deputy Coroner
2. Mr. Scott C. CROSIER, Aviation Safety Inspector, San Diego F.S.D.O.,
3. MR. David A. MARTINEZ, Airport Comandante, Tijuana International Airport
4. Mr. David F. CASILLAS, Office of Director General of Civil Aeronautics, Tijuana International Airport, and
5. Mr. Jim WALLACE, N.T.S.B. (LAX).

153 test. LA. 1938, 119

Reporting Officer L. R. ANDERSON I.D.# 3308
Division Traffic Approved By _____
Date of this report _____ Time ____ Hours

[Exhibit 24, excerpt.]

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

CERTIFICATE OF TRUE COPY

I HEREBY CERTIFY that the attached is a true copy of the original on file in the Operations and Facilities Division, National Transportation Safety Board, which original comprises the material available from the NTSB public reference file concerning the aviation accident at San Diego, California, on September 30, 1987, involving, NXAKOA, and that I have legal custody of the records involved.

Signed and dated at Washington, D.C.
this 19th day of January 19 90
by Cathleen Gilchrist
(Signature)
Record Management Officer
(Title)

****

I HEREBY CERTIFY that Cathleen Gilchrist who signed the foregoing certificate is now, and was, at the time of signing the Records Management Officer, public Inquiries Section, Operations and Facilities Division, National Transportation Safety Board, that she has legal custody of the record involved, and that full faith and credit should be given her certificate as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the National

Transportation Safety Board to be
affixed this 19th day of January 19 90

William N. Park
(Signature)
Chief, Operations and Facilities Division
(Title)

National Transportation Safety Board

NTSB Form 1320.17 (Rev. 6/80)

National Transportation Safety Board ACCIDENT FILE CONTENTS	PAGE 1 OF 1 PAGES
Transportation Mode X AVIATION __ HIGHWAY __ PIPELINE _ INTERMODAI __ MARINE _RAILROAD	NTSB FILE NO

IDENTIFICATION OF ACCIDENT
SAN DIEGO, CALIFORNIA
SEPTEMBER 30
CESSNA 340A, XA-KOA
LAX-87-F-A350

Item No	DESCRIPTION OF ITEM	No of Pages	
		Doc	Color Photo
1.	Accident File Contents, NTSB Form 6120.3	1	
2.	Factual Report Aviation Accident/Incident, NTSB Form 6120.4	14	
	Supplement A	2	
	Supplement B	4	
	Supplement F	1	
	Supplement K - Mr. Raul G. Tellez	5	
	Supplement K - Mr. Manuel Hernandez	5	
	Supplement K - Mr. Yoshihito Kodani	5	
	Supplement K - Mr. Katsuo Sugimoto	5	
	Supplement K - Mr. Hideo Omachi	5	
	Supplement K - Mr. Ramon Schoenberg	5	
	Supplement Q	3	
	Supplement R	2	
	Supplement S	1	
	Supplement U	4	
3.	San Diego Department Report	2	
4.	Requested Data from Comandancia del Aeropuerto de Tijuana, BC, Mexico	4	
5.	Sunrise Information	1	

	Statement of Representative of Party to NTSB Investigation	1	
	Toxicology Report, Mr. Raul G. Tellez	2	
	15 Photographs w/Negatives		8
	TOTAL NUMBER OF PAGES	72	8

NTSB Form 6120.3 (Rev 1076)

NATIONAL TRANSPORTATION
SAFETY BOARD

FACTUAL REPORT
AVIATION
ACCIDENT/INCIDENT

LAX 87-F-A-350

National Transportation Safety Board
Washington, D.C. 20594

NTSB Form 6120.4 (Rev 1-84)

Instructions

Unless otherwise stated in the instructions or on the form, all data fields must be completed. Each data field requires either a direct entry or the entry of one or more x's in appropriate blocks that best describe the mishap circumstances. Multiple entry fields may require two or more responses. Enter all applicable responses in multiple entry fields. When the selections offered are inappropriate, a two digit "other" code shall be entered in the space that follows the word "other." Do not make additional remarks in the margins as the automated data processor is not programmed to accept them. Any information which is needed to outline the sequence of events which preceded the occurrence, to support probable cause determination or which is pertinent to crashworthiness studies should be addressed in the narrative report.

"Other" Codes

01 Limited access to and/or limited time available at site.
02 Aircraft not recovered/missing.
03 Part/component not recovered/not located.
04 Aircraft too badly damaged to determine.
05 Part/component too badly damaged to determine.
06 Information not pertinent to accident/incident.
07 Applicable personnel could not provide information or information not available to applicable personnel.
08 Applicable personnel would not provide information.
09 Not installed.
10 Records not located/not available.
11 Information not entered on NTSB Form 6120.1.
12 See narrative report.

Supplements

The following accident scenarios are provided to assist investigators in selecting the report forms which should supplement the basic NTSB Form 6120.4.

1. A Cessna 172 collided with a snowbank during landing go around at an airport. Weather was not a factor. The pilot said there was no powerplant or control malfunction. The pilot and one passenger received minor injuries. The pilot had recently been certificated as a private pilot.

Complete supplemental forms F (Training and Proficiency), Q (Airport) and S (Occupant list). A "Limited" investigation should be completed.

2. A PA-31, being operated by two pilots under FAR 135, crashed into a tower while being vectored to intercept the localizer at the destination airport. The PA-31 struck the tower while being operated at an assigned altitude. Flight was in IMC. There were two fatal injuries and three serious injuries. CFR personnel responded and treated the injured.

This accident requires an onscene investigation. Thus supplement A (Wreckage documentation), B (cockpit documentation) and I (Crash kinematics) are required. Supplements F (Second pilot), F (Training and Proficiency) and U are required because of the two pilot FAR 135 operation (even though proficiency may not be at issue). S is needed to list the occupants; T, to document the CFR activity and P, to cover the possible ATC involvement. R (Meteorology) is required to document the weather conditions. Copies of supplements K and L would be required to document injury/toxicology and seat/restraint damage information, respectively.

National Transportation Safety Board FACTUAL REPORT AVIATION	1 NTSB Accident/Incident No. LAX87FA350			
	2 1 _x_ Accident 2 __ Incident	3 Investigation 1 _x_ NTSB 2 __ FAA Delegated		
4 Aircraft Registration No XA-KOA	5 Flight No A Other 06	*For collision between aircraft enter reg. no. and flt. no. for other aircraft*	6 Aircraft Registration No	7 Flight No A Other 06
8 Nearest City/Place San Diego	9 State CA	10 Zip Code (First 5 numbers only) 92138	11 Accident Site Elevation _389_ Feet MSL	

16 Narrative Statement of Facts, Conditions and Circumstances Pertinent to the Accident/Incident

HISTORY OF FLIGHT

On September 30, 1987, at 0759 hours[1/], a Cessna 340A, XA-KOA, operated by Aero Servicio de Sonora, collided with the terrain near General Abelaro L. Rodriguez Int'l Airport, Tijuana, Mexico. The accident occurred within the United States, near San Diego, California and approximately 100 yards north of the International Border.

The Aircraft was on a commercial, non-scheduled, domestic, passenger flight, at the time of the accident.

Instrument meteorological conditions prevailed at the

time and an instrument flight plan was filed. The aircraft was destroyed by impact forces and the certificated commercial pilot and his five passengers were fatally injured.

The flight originated at Guerrero Negro, Mexico on September 30, 1987, at approximately 0600 hours[1/].

[1/] All times are Pacific Daylight Time based on the 24 hour clock.

Additional Persons Participating in this Accident/Incident Investigation (Name, address, affiliation. Continue on page 2 if necessary)

WILLIAM S. ROSS, CESSNA AIRCRAFT COMPANY, WICHITA, KS 67277
MICHAEL J. GRIMES, CONTINENTAL MOTORS, MOBILE, AL 33601
LARRY STEWART, FAA, SAN DIEGO, CA FSDO

Investigated By:

17 Date (Nos. for M.D.Y)	18 Agency	19 Name/Signature
3/10/89	NTSB	JAMES A. WALL

National Transportation Safety Board	NTSB Accident/Incident Number
FACTUAL REPORT AVIATION	LAX87FA350

16 Narrative Statement of Facts, Conditions and Circumstances Pertinent to the Accident/Incident (Continued)

Upon arriving in the Tijuana area, Mexican air traffic

controllers provided the pilot with current weather conditions and cleared the aircraft for an ILS approach to runway 09.

After flying the 12 mile DME arc southwest of the Tijuana VOR for alignment with the localizer, the aircraft was cleared for the approach. American controllers, who visually monitor aircraft in their airspace during this approach, stated that they saw nothing unusual.

The pilot reported his altitude as 1200 feet mean sea level (MSL) over "ALBA", the final approach fix to controllers at General Rodriguez airport. Shortly thereafter the controllers lost radar and radio contact with the aircraft before it reached the middle marker. The marker is located .5 miles from the approach end of the runway 09.

The aircraft's wreckage was found at approximately 0816 hours[1/] on September 30, 1987 by United States Border Patrol personnel. It was located approximately one mile west of General Rodriguez Airport.

METEOROLOGICAL

The weather at General Rodriguez Airport was reported as:

0715 hours[1/]; sky partially obscured, visibility 1 mile in fog, haze and smoke, temperature/dew point missing, wind calm, altimeter 29.96 inches Hg.

0800 Hours[1/]; sky partially obscured, visibility 1/10 mile in fog and haze, temperature 63 degrees, dewpoint 63 degrees Fahrenheit, wind from 240 degrees at 4 knots, altimeter 29.97 inches Hg.

The weather at Brown Field, San Diego, California, located about one mile north of the accident site was reported as:

0800 hours[1/]; sky partially obscured, visibility 3/4 mile in fog and haze, temperature 64 degrees, dew point 62 degrees fahrenheit, wind from 280 degrees at 4 knots, altimeter 29.96 inches Hg.

Two pilot weather reports (PIREP) of the fog/cloud tops were received by air traffic controllers at Lindbergh Field, San Diego,California. Lindbergh is located approximately 15 nautical miles, west-northwest of the accident site.

At 0700 hours[1/]; fog/cloud tops were reported at 900 feet.

At 0800 hours[1/]; fog/cloud tops were reported at 1,200 feet.

Attach additional pages as necessary (Page 2a, 2b, 2c, etc.)

National Transportation Safety Board FACTUAL REPORT AVIATION	NTSB Accident/Incident Number LAX87FA350

16 Narrative Statement of Facts, Conditions and Circumstances Pertinent to the Accident/Incident (Continued)

The sun's altitude above the horizon, as viewed from General Rodriguez Airport, was calculated without correction for non-level horizons. The calculations at

0755 hours[1/] depicts the sun at 15 degrees above the horizon and on a magnetic azimuth of 89.1 degrees from the airport. At 0800 hours[1/] the sun was at 16 degrees above the horizon and on a magnetic azimuth of 89.8 degrees from the airport.

AIDS TO NAVIGATION

The Commandant of General Rodriguez Airport reported that there were no failures or malfunctions in the ILS, DME, or radar systems noted prior to or at the time of the accident.

COMMUNICATIONS

A cassette tape recording of the pilot/controller conversation was made available to The Board by the Commandant of General Rodriguez Airport. After a transcription was made of the conversations the tape was returned to the Commandant.

The audio information on the tape was distorted but did provide the following:

____ = unintelligible words.

pilot: attention ____ ____ ____ tijuana ____ ____ ____

atc: go ahead

pilot: ____ ____ ____ ____ cessna 340 flying from guerrero negro
to tijuana destination tijuana about 50 miles on the 144 radial with 12 thousand ____ desire tijuana weather.

atc: certainly sir wind calm altimeter 29.94 no temperature ____ ____ ____ ____ ____ ____ ____ ____

pilot: i'll have to go to mexicali

atc: no
pilot: ensenada is also closed
atc: ____ ____ ____ ____
pilot: ____ ____ ____ ____

WRECKAGE

The aircraft impacted the ground into a 37 degree up-sloping ridge in a level pitch and roll attitude. The aircraft' impact heading was 085 degrees. The elevation of the point of ground impact was approximately 389 feet. The silhouette of the aircraft was imprinted in the loose dirt at the point of ground impact.

Attach additional pages as necessary (Page 2a, 2b, 2c, etc.)

National Transportation Safety Board	NTSB Accident/Incident Number
FACTUAL REPORT AVIATION	LAX87FA350

16 Narrative Statement of Facts, Conditions and Circumstances Pertinent to the Accident/Incident (Continued)

After impacting the ground the wreckage tumbled over a ridge, on a magnetic heading of 120 degrees. The wreckage continued its tumbling up another hill before coming to a rest on its left side. The empennage separated from the cabin section during the ground impact sequence.

A section of the skin from the left main wing tip fuel tank displayed evidence of compression bending and was imbedded in the ground at the point of initial impact.

The right main fuel pump armature was torn from its housing and imbedded in the hole made at ground impact. The armature displayed evidence of rub around its circumference.

ENGINES

The left engine was attached to the nacelle and twisted to an inverted position. There were six chrome cylinders attached to the case and the mixture control in the fuel injector was in the idle cut-off position. The turbocharger was detached from the engine and the impeller blades were seized against the housing.

The right engine separated from the airframe. It had six chrome cylinders attached and was located about 100 feet below the main wreckage. The fuel injector throttle valve was jammed in the center of travel. The right magneto was broken from the accessory

case. The alternator was torn from the crankcase and the crankcase was fractured.

PROPELLERS

The left propeller separated from the engine and the engine and the propeller blades separated from the hub. The blades were deeply gouged on the leading edges and exhibited cordwise scratches across the face of the blades.

The right propeller separated from the engine crankshaft and was located about 87 feet beyond the point of initial ground impact. One of the blade tips separated from the blade and one blade displayed evidence of forward blade curl. The blades displayed cordwise scratched across the face and deep gouges along the leading edges.

MEDICAL AND PATHOLOGICAL

A Pathological examination of the pilot by Dr. David M. Katsuyama of the San Diego County Coroner's Office did not disclose any evidence of a preexisting physical condition that would have detracted from his ability to operate the aircraft.

Toxicological tests of the pilot were conducted for drugs and alcohol. A blood caffeine level of less than 1MCG/ML and a blood ethanol level of 72MG/DL (0.07 percent) was detected.

Attach additional pages as necessary (Page 2a, 2b, 2c, etc.)

National Transportation Safety Board FACTUAL REPORT AVIATION	NTSB Accident/Incident Number LAX87FA350

16 Narrative Statement of Facts, Conditions and Circumstances Pertinent to the Accident/Incident (Continued)

ADDITIONAL INFORMATION

The Safety Board did not take possession of the wreckage due to the non-availability of guards. The wreckage was guarded by U.S. Border Patrol personnel during the daylight hours on September 30 and October 1, 1987. The Commandant of General Rodriguez International Airport was asked to advise the operator, who was at the airport, that the investigators and guards would leave the accident site at 1400 hours[1/] on October 1, 1987.

Attach additional pages as necessary (Page 2a, 2b, 2c, etc.)

NTSB Form 6120.4 (Rev. 1-84) Page 2 ___

* * * *

[Remainder of Report Omitted.]

L. Scott Keehn
John H. Stephens
ROBBINS, KEEHN & JONES
A Professional Corporation
530 "B" Street, Suite 1700
San Diego, California 92101
Telephone: (619)232-1700

[Filed Feb. 1, 1989]

[Exhibit 72-3]

Attorneys for Defendant,
EXPORTADORA DE SAL, S.A. DE C.V.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, et al., Plaintiffs, v. EXPORTADORA DE SAL, S.A. DE C.V., et al., Defendants.	Civil No. 88-1532-JLI(IEG) DECLARATION OF MANUEL GUZMAN IN SUPPORT OF MOTIONS TO DISMISS, FOR SUMMARY JUDGMENT, AND TO STRIKE Date: June 5, 1989 Time: 10:30 a.m. Place: Courtroom 8 The Honorable J. Lawrence Irving

MANUEL GUZMAN DECLARES:

1. I am the Coordinator of the San Diego Office of Exportadora de Sal, S.A. de C.V. ("Exportadora") and was the Manager of Purchasing and Traffic for Exportadora when

the subject aircraft collision happened. I personally visited the scene of the accident the day it occurred and am familiar with the preceding events. A copy of the National Transportation Safety Board's Preliminary Report regarding the accident is attached as Exhibit "A".

2. Exportadora is a Mexican corporation. A majority of its stock is owned by the Government of Mexico, the remainder by a Japanese corporation. Exportadora's only business is the production and exportation of salt, which it does through its sole production facility in Guerrero Negro, Baja California, Mexico. The salt is produced through a solar evaporation process that involves pumping sea water into a series of evaporation ponds.

3. Exportadora maintains an office in San Diego which is used primarily for purchasing equipment and parts needed to operate the facility in Guerrero Negro. The office's only other function is the coordination of salt shipments from Guerrero Negro to purchasers, and administration of accounts receivable in local banks. Exportadora has no other offices or facilities.

4. Since about 1983, members of Tottori University in Japan have been doing an agricultural experiment on a small piece of Exportadora's land next to the salt production facility. The experiment has been done with the cooperation of two branches of the Mexican Government: the Department of Agriculture and Water Reclamation (Secretaria de Agricultura y Recursos Hidraulicos), and the National Institute of Agricultural Research (Instituto Nacional de Investigaciones Agricolas). Although Exportadora has no involvement in the experiment, it has been encouraged by the Government of Mexico to assist the Japanese as a courtesy to its co-stockholder in Exportadora and Tottori University. Members of the University have also asked Exportadora to assist them in their dealings with the Mexican Government. A copy of an early letter from the University to Exportadora is attached as Exhibit "B".

5. Because transportation to Guerrero Negro is not regular, Exportadora has been asked occasionally to provide

transportation for the Japanese either to or from Guerrero Negro. This only happens about once a year because the experiment is monitored by just two Japanese. When asked, Exportadora generally provides free air transportation on its sole company-owned aircraft. The plane, when available, makes regular but unscheduled flights between Tijuana and Guerrero Negro. On other occasions, the Japanese are allowed to ride on any trucks or other vehicles, or infrequently on any planes that Exportadora might have chartered, making trips between Guerrero Negro and Tijuana.

6. To the best of my knowledge and information, two of the passengers on the September 30, 1987 flight that crashed, were members of Tottori University -- Dr. Sugimoto and Dr. Kodani. They were not like the usual members and did not stay for the normal one to two years, or like the supervisor who generally visited once a year for about two months. Instead, they spent about a week for an unknown purpose.

7. The other Japanese passenger on the September 30 flight was a Mr. Omachi. Based on our information, he had flown to Guerrero Negro from Mexico City and Exportadora had been asked to arrange transportation for him to Tijuana.

8. The two other passengers on the flight were technicians from Berkeley Pump Corporation in California. They were in Guerrero Negro on a sales call to solicit Berkeley's latest pumps to Exportadora. Berkeley Pump's representatives had made similar trips to Guerrero Negro about once a year.

9. On September 29, 1987 when the Japanese and the Berkeley technicians were ready to return to Tijuana, Exportadora's company plane was not available in Guerrero Negro. As alternate transportation, Exportadora chartered a plane from Aviones de Sonora ("Aviones") to make a round trip from Sonora to Guerrero Negro to Tijuana and back. During that time period, Exportadora chartered aircraft from Aviones about five times a year and paid a fixed sum for the

round trip.

10. Until the September 1987 accident, Exportadora had used Aviones' services without incident. No accidents, near accidents, or equipment failures ever occurred.

11. The day of the collision, Exportadora paid for the chartered flight without reimbursement from the passengers. It was by then accepted practice for the Japanese to provide their own transportation to and from Japan, and for Exportadora to provide transportation to and from Guerrero Negro. Exportadora and Berkeley Pump had a similar practice. Exportadora would arrange air transportation within Mexico and Berkeley Pump would arrange it within California.

12. Other than chartering the aircraft, Exportadora had no control of the flight. It did not employ the pilot, own the aircraft or hold any interest in Aviones.

13. The claim in this lawsuit that Exportadora and Aviones had "entered a joint venture or other similar relationship" different than that of any other customer. We purchased air transportation.

14. Exportadora has never provided maintenance service for any of Aviones' aircraft either, nor does it service its own company plane.

15. We, at Exportadora, were deeply saddened by the September 1987 accident; however, we cannot accept any responsibility. Whatever happened as the plane was attempting to land at the Tijuana airport, Exportadora had no control.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on February 15, 1989 at San Diego, California.

/S/
Manuel Guzman

[Emphasis added.]

National Transportation Safety Board PRELIMINARY REPORT AVIATION					NTSB Accident/Incident Number LAX87FA350 Investigation By NTSB
1 Accident	4 I.C.A.O. Preliminary Report Submitted (NTSB only) Yes				5 Report Status Preliminary Report
Location/Date					
6 Nearest City/Place San Diego	7 State CA	8 Zip Code (First 5 Nos.) 92138	9 Date (Nos.for M,D,Y) 9/30/87	10 Local time (24 hour clock) 0759	11 Time Zone PDT
Aircraft Information					
12 Registration No. XAKOA		13 Aircraft Manufacturer CESSNA			14 Model/Series No. 340A
15 Type of Aircraft Airplane					16 Home built No
Accident Information					
20 Aircraft Damage Destroyed	21 Property Damage (Multiple entry) None	22 Accident/ incident Phase of Operation Approach	23 Injury Index (Most critical injury) Final		
Injury Summary	24 Fatal 6	25 Serious	26 Minor	27 None	

Crew	Injury Code	Passenger	Injury Code
Tellez, Raul G. HEMOSILLIO, OF	4	SUGIMOTO, DR.	4
		KODANI, DR.	4
		OMACHI, MR.	4

		HERNANDEZ, MANUEL	4
		SCHOENBERG, RAMON	4

Injury codes None--1 Minor--2 Serious--3 Fatal--4

Operator Information

42 Name	46 City	47 State
AERO SERVICIO DE SONORA	HEMOSILLIO, MX	OF

Type of Certificate(s) Held

50 Air Carrier Operating Certificate
On-demand air taxi

Regulation Flight Conducted Under

53
A Specify MEX FLT RULE

PRELIMINARY INFORMATION - SUBJECT TO CHANGE

NTSB Form 6120.19A (1-84) Page 1
This form supersedes NTSB Form 6120.19 (Rev.1-83)

National Transportation Safety Board PRELIMINARY REPORT AVIATION ACCIDENT/INCIDENT	NTSB Accident/Incident Number LAX87FA350

Type of flight Operation conducted

(Complete 54, 55, 56. Only if flight was a revenue operation conducted under 121, 125, 127, 129, 135)

Flight Plan/Itinerary

58 Flight Plan filed IFR

59 Itinerary-Last Departure Point	60 State	62 Destination	63 State	64 Airport I.D.
GUERRERO NEGRO	MX	TIJUANA	MX	MMTJ

Weather Information

65 Source	67 Sky/Lowest Cloud Condition	68 Lowest Ceiling	69 visibility (decimals)
Weather Observation Facility	Partial obscuration	None	0.75 SM
66 Time of Weather Observation			70 Temperature
0800 (local)			64 Fahr.
			71 Dew Point
			62 Fahr.

72 Wind Direction	73 Wind Speed	75 Altimeter	76 Weather Conditions (at accident site)	77 Precipitation
280 Degrees (Meg.)	4 Kts.	29.96 Hg	IMC	No

Narrative

78 (Brief resume of facts. The information shall not contain opinion, conjecture, or statements reflecting on the character or integrity of the persons involved.)

On September 30, 1987, at 0759 hours PDT, a Cessna 340A, XAKOA, operated by Aero Servicio de Sonora, collided with the terrain, approximately 1 mile from the approach end of Runway 09, at General Abelaro L. Rodriguez Int'l Airport, Tijuana, Mexico, while on a non-scheduled domestic passenger flight. Instrument meteorological conditions existed at the time and an IFR flight plan was filed. The aircraft was destroyed by impact forces and the certificated commercial, instrument rated, Mexican pilot and his 5 passengers received fatal injuries. The flight originated at Guerrero Negro, Mexico, on September 30, 1987, at approximately 0620 hours PDT.

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(Please continue to next page.)

PRELIMINARY INFORMATION - SUBJECT TO CHANGE

National Transportation Safety Board PRELIMINARY REPORT AVIATION ACCIDENT/INCIDENT	NTSB Accident/Incident Number LAX87FA350

Narrative (continued)

The pilot reported at 1200 feet MSL over "ALBA", final approach point for the ILS-DME approach to Runway 09. The approach plate shows that the glide slope is to be intercepted at 2500 feet at "ALBA".

There were 2 PIREPs of cloud tops reported to Lindbergh Field, which is located approximately 12 nautical miles west northwest of the accident site. The cloud tops at 0700 hours PDT were reported at 900 feet MSL. At 0900 hours PDT the cloud tops were reported at 1200 feet MSL.

The aircraft impacted into a 37 degree upslope, while in level flight and appeared to be tracking the localizer approximately 1 nautical mile short of the runway. The elevation of the ground impact point was 350 feet MSL or 118 feet below the touchdown zone elevation of 468 feet. The aircraft, at this distance from the runway should have been approximately 436 feet above the elevation of the touchdown zone. The published decision height for this approach is 786 feet MSL or 300 feet above the elevation of the touchdown zone.

The commandante at General Rodriguez Airport reported the localizer, DME and glide slope were operational during the approach.

(Please continue to next page.)

Administrative Data

79 Notification From	80 Date(Nos.for M,D,Y)	81 Local Time(24 hour clock)	82 Time Zone
FAA, AWP COMM CENTER, L.A.	9/30/87	0910	PDT

83 FAA District Office/Coordinator
FSDO-9, LARRY STEWART, SAN

Investigator(s) Assigned

85 Investigator-in-Charge	86 Form Preparation Date(Nos.for M,D,Y)	87 Form Receipt Date(For NTSB use only)
James A Wall	10/6/87	10/6/87

PRELIMINARY INFORMATION - SUBJECT TO CHANGE

TOTTORI UNIVERSITY
1390 HAMASAKA, TOTTORI, 680 JAPAN
TELEPHONE: 0857-23-3411

1983. 2. 22

Dear Ing. F. Guzman Lazo

Thank you very much for your kind support for us.

We would like to start our agricultural experiment about cultivation of vegetables in the desert in Guerrero Negro.

Our experiment schedule is as follows:

1st period: Apr.1983 - Mar.1984 at Guerrero Negro
Apr.1984 - Mar.1985 in Japan to make report
2nd period: Apr.1985 - Mar.1986 at Guerrero Negro
Apr.1986 - Mar.1987 in Japan to make report

We will continue our experiment as 3rd period if necessary.

We would like to ask you to coordinate between, Secretaria de Agricultura y Recursos Hidraulicos (SARH), Instituto Nacional de Investigaciones Agricolas (INIA) and Tottori University in order to obtain the authorization from SARH. We understand that INIA has much interest about our experiments in Guerrero Negro.

We know that you are one of the most typical joint company with Mexican government and Japanese company, Mitsubishi Corporation, and you have the biggest salt field in the world in Guerrero Negro. We also understand very well that you are contributing to establish friendly relations between Mexico and Japan.

We hope that our agricultural experiment in Guerrero Negro will enable you to expect to get fresh vegetables there in near future and this experiment work will give Mexico new agricultural technology in the desert area.

This study in Guerrero Negro will also greatly contribute for promoting closer relationship between Mexico and Japan.

We will highly appreciate your kindness.

Yours truly,
/s/
Masao Toyama

Ing. F. Guzman Lazo
Director General
Exportadora De Sal. S.A. De C.V.

L. Scott Keehn
John H. Stephens
ROBBINS, KEEHN & JONES
A Professional Corporation
530 "B" Street, Suite 1700
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Attorneys for Defendant,
EXPORTADORA DE SAL, S.A. DE C.V.

[Filed May 26, 1989]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG; MARTIN SCHOENBERG; TOMAS SCHOENBERG; DAN A. SCHOENBERG; ADRIANA SCHOENBERG; and BILL SCHOENBERG,	) Civil No. 88-1530 JLI(IEG)) DECLARATION OF MANUEL GUZMAN IN SUPPORT OF REPLY MEMORANDUM	
Plaintiffs,	) Date:	June 5, 1989
	) Time:	10:30 a.m.
	) Place:	Courtroom 8
v.	)	The Honorable J. Lawrence Irving
EXPORTADORA DE SAL, S.A. DE C.V., a foreign corporation; AVIONES DE SONORA, S.A., a foreign corporation; UNITED MEXICAN AIRCRAFT	)	

CO., a foreign state;)
CESSNA AIRCRAFT)
CO., a corporation;)
TELEDYNE)
INDUSTRIES, INC.,)
a corporation,)
)
Defendants.)
_____)

MANUEL GUZMAN, declare:

1. I previously submitted a declaration in support of the motions of Exportadora de Sal, S.A. de C.V. ("Exportadora") to dismiss the complaints. I now submit this declaration to correct numerous inaccuracies contained in plaintiffs' opposition to the motions.

2. Exportadora's San Diego Office is not and never has been the principal place of business for the corporation. The corporate headquarters and administrative offices are in Guerrero Negro, Baja California Sur, Mexico. Exportadora's General Director, Mr. Juan I. Bremer is based there as are all officers of the corporation.

3. Because plaintiffs have raised questions about Mr. Bremer, I wish to clarify otherwise irrelevant facts that Mr. Bremer's family does maintain a house in San Diego where some of them attend college.

4. Exportadora's sole production facility is located in Guerrero Negro where it manufactures salt through a solar-evaporation process in an area covering more than 60,000 acres. The facility includes a warehouse where parts and equipment are stored, company housing, and a port to load barges.

5. Exportadora also operates a market which is stocked primarily with food imported from Tijuana and Ensenada, Mexico. The Mexican authorities do not allow Exportadora to ship food from the United states.

6. Vegetables grown at the experiment being

conducted on land adjacent to the facility are not purchased by Exportadora or sold through the market. The experiment has been conducted by members of the Tottori University in Japan with the cooperation of the Mexican Government. Exportadora is not involved other than providing assistance as requested by the Government of Mexico.

7. Some vegetables periodically are given away in Guerrero Negro; however, the amount is insignificant.

8. Exportadora's San Diego Office, only employs ten people. Of that, four live in Tijuana. We maintain limited office space and a warehouse that occupy a combined area of 13,000 square feet most of which is used to house parts and equipment in transit to Guerrero Negro.

9. No one in the San Diego Office makes policy or business decisions on behalf of Exportadora. All such decision are made in Guerrero Negro and those that must be executed in San Diego are handled by our office.

10. The responsibilities of the San Diego Office generally fall into two categories, communications and shipping/transportation. Until recently, our office has acted as the only conduit for communication with Guerrero Negro and those outside Mexico because direct communication was not possible. The San Diego Office, however, has had direct transmission capabilities through telex and teletype facilities. As of last year, phone lines have been available to Guerrero Negro.

11. The San Diego Office also relays shipping and transportation to and from Guerrero Negro. Again, this is done out of necessity because the airports in Tijuana and Guerrero Negro do not handle international flights. Passengers from outside Mexico generally must arrive in San Diego and depart Tijuana for Guerrero Negro, and then reverse the process when leaving Guerrero Negro.

12. Parts and equipment purchased form suppliers located outside Mexico go through a similar process because they cannot be shipped across the border without approval by both United states and Mexican Customs. That normally occurs in San Diego.

13. Salt produced by Exportadora is often transported to purchasers by Baja Bulk Carriers ("Baja Bulk"). Baja Bulk is a Liberian corporation and is not a wholly owned subsidiary of Exportadora. It is owned in equal parts by the Government of Mexico and Mitsubishi Corporation.

14. Because of its communication capabilities, the San Diego Office coordinates some of the salt shipments from Guerrero Negro to purchasers. The San Diego Office, however, does not sell any of Exportadora's salt as plaintiffs state.

15. When Mr. Schoenberg and Mr. Hernandez proposed their trip to Mexico, the request was transmitted through San Diego to Guerrero Negro. (Copies of certified translations of telexes sent to Guerrero Negro are attached as Exhibits A, B, and C.)

16. The decision to receive Mr. Schoenberg and Mr. Hernandez was made in Guerrero Negro by Mr. Bremer and relayed to us by telex for confirmation. (A copy of the certified translation of the telex is attached as Exhibit D.)

17. The decision to receive Mr. Sugimoto and Mr. Kodani was also made in Guerrero Negro. In that instance, the request was made directly to the attention of Mr. Hugo Martinez, Mr. Juan Bremer and Mr. I. Hina, all of whom were based in Guerrero Negro. (Mr. Martinez has since left Exportadora.) (Copies of the telexes received from Japan are attached as Exhibits E and F.)

18. The San Diego Office has no records indicating that the third Japanese passenger, Mr. Omachi, intended to visit our offices or that he contacted us before his trip.

19. When Mr. Schoenberg and Mr. Hernandez proposed their trip to Guerrero Negro, Exportadora thought they were employees of Berkeley Pump Company ("Berkeley Pump") which had supplied pumps and parts used in the salt production process. I was not aware until I read Mr. Bunce's declaration, filed on plaintiffs' behalf, that Mr. Schoenberg had left Berkeley Pump and started his own business. Mr. Schoenberg apparently was courting Exportadora for future business with his company, Prime Pump, with which

Exportadora had no existing business relationship.

20. I now believe that Mr. Hernandez also planned to leave Berkeley Pump and join Mr. Schoenberg in his new venture when he made the trip to Guerrero Negro. He had asked my assistant, Mrs. Carmen A. Chavez who often handled communications with Berkeley Pump, not to mention that he was making the trip because he planned to leave Berkeley Pump and had told them he would be on vacation. This was confirmed later by Berkeley Pump when Mrs. Chavez called to discuss the accident. they were particularly surprised because Mr. Hernandez was thought to be on vacation. I discussed the conversation with Mrs. Hernandez at the time but did not understand its significance until I read Mr. Bunce's declaration.

21. Since my deposition, I have tried to determine the flight plans for Exportadora's company plane on September 30, 1987, the day of the accident. Because weekly schedules are only kept for routine flights between Guerrero Negro and Tijuana, we generally have no records when non-routine flights are made. My information from talking to personnel in Guerrero Negro who schedule flights is that the company plane was required to make a trip to Mexico city that day.

22. Plaintiffs improperly use Exportadora's flight schedule to speculate that the company plane remained on the ground in Guerrero Negro for weather to clear before flying to Tijuana to pick up passengers at 11:30 a.m. (A copy of the certified translation that plaintiffs rely on is attached as Exhibit G.) The telex in question clearly states the Aviones plane would make the round trip that day including the return flight to Guerrero Negro at 11:30.

23. In addition, because a trip has been scheduled does not mean the company plane will make the flight. We try to use the plane as much as possible but it only makes the routine trips when available. The round trip scheduled on the day of the accident was no different from any other scheduled round trip. (Copies of the certified translations for flights scheduled the weeks of September 20, 27, and October 4 are attached as Exhibits H and I.) We try to

make three round trips a week to Tijuana leaving from Guerrero Negro and returning the same day.

24. Plaintiffs' statement that Exportadora's company plane is "maintained" in Long Beach is accurate but misleading. The plane is based and housed in Guerrero Negro. It only goes to Long Beach when repairs or servicing are needed.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on May 26, 1989, at San Diego, California.

/S/
Manuel Guzman

[Emphasis added. Exhibits omitted.]

* * * *

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[Filed July 17, 1989]

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG; MARTIN SCHOENBERG; TOMAS SCHOENBERG; DAN A. SCHOENBERG; ADRIANA SCHOENBERG; BILL SHOENBERG; LILLY SCHOENBERG; CARMEN HERNANDEZ; MANUEL FRANCISCO HERNANDEZ; SUSAN PATRICIA HERNANDEZ; HIROKO SUGIMOTO; MITSUKUNI SUGIMOTO; YASUNOBU	CIVIL NO. 88-1530 JLI (IEG) CIVIL NO. 88-1531 JLI (IEG) CIVIL NO. 88-1532 JLI (IEG) CIVIL NO. 88-1919 JLI (IEG) CIVIL NO. 88-1920 JLI (IEG) ORDER CONSOLIDATING RELATED CASES Date: July 17, 1989 Time: 10:30 a.m. Place: Courtroom 8 Honorable J. Lawrence Irving

SUGIMOTO; KIMIKO KODANI; MAYUMI NUKIWA; KYOKO KODANI; KUNIKO OMACHI,Individually, and as guardian Ad Litem on behalf of ERI OMACHI, a minor,

Plaintiffs,

vs.

EXPORTADORA DE SAL, S.A. DE C.V., a Mexican corporation; AVIONES DE SONORA S.A., a Mexican corporation, UNITED MEXICAN STATES, a foreign state, CESSNA AIRCRAFT CO., a Kansas corporation, TELEDYNE INDUSTRIES, INC., a California corporation, DOES 3 through 65, GREEN CO., a partnership, and ROES 1 through 26, corporations, inclusive,

Defendants.

Plaintiffs' Motion to Consolidate Related Cases came on for a hearing on July 17, 1989, the Honorable J. Lawrence Irving presiding. The Court, considering the

Memorandum of Points and Authorities submitted, the Opposition, and the arguments of counsel, finds that there is good cause for purposes of efficient administration for consolidation of these related cases, arising out of the same occurrence, and aircraft accident in San Diego, California, and presenting common issues of fact and law. Accordingly,

IT IS ORDERED:

1. These related cases are consolidated;

2. Only one document need be filed, in Case No. 88-1530 JLI (IEG), to serve as a filing in all five related cases, provided that the paper filed in Case No. 88-1530 JLI (IEG) shall have a consolidated caption bearing the case numbers of all of the related cases. The caption of this Order is an example of the consolidated caption;

3. If a document pertains to only one of the cases, that document shall be so designated;

4. Only documents having special application to particular cases need be filed separately in individual case files.

Dated: July 17, 1989
San Diego, California

/s/
J. Lawrence Irving
United States District Judge

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[Filed Aug. 26, 1991]

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, MITSUKUNI SUGIMOTO, YASUNOBU SUGIMOTO, KIMIKO KODANI, MAYUMI NUKIWA, KYOKO KODANI, KUNIKO OMACHI, Individually, and as Guardian Ad Litem on behalf of ERI OMACHI, a minor	)	CIVIL NO. 88-1532 R (P) FIFTH AMENDED COMPLAINT FOR DAMAGES FOR WRONGFUL DEATH
Plaintiffs,	)	
vs.	)	

EXPORTADORA DE SAL, S.A DE C.V., a Mexican corporation; AVIONES DE SONORA, S.A., a Mexican Corporation; CESSNA AIRCRAFT CO., a Kansas corporation, Defendants.	)	JURY TRIAL DEMANDED

COME NOW the plaintiffs and for a claim for relief complain of defendants and each of them and allege as follows:

PARTIES

1. Plaintiffs HIROKO, MITSUKUNI, and YASUNOBU SUGIMOTO, and each of them are citizens of Japan, and the surviving heirs at law of decedent KATSUO SUGIMOTO.

2. Plaintiffs KIMIKO KODANI, MAYUMI NUKIWA, and KYOKO KODANI, and each of them are citizens of Japan, and the surviving heirs at law of decedent YOSHIHITO KODANI.

3. Plaintiffs KUNIKO OMACHI and minor plaintiff ERI OMACHI are citizens of Japan, and the surviving heirs at law of HIDEO OMACHI.

4. On September 29, 1988 plaintiff KUNIKO OMACHI was appointed Guardian ad Litem of ERI OMACHI, who was at that time about seven months old.

5. Defendant EXPORTADORA DE SAL, S.A. DE C.V. (hereinafter "EXPORTADORA") is a Mexican corporation, existing under and by virtue of the laws of the country of Mexico and doing business in the State of California with substantial offices and facilities in the City of San Diego. Defendant EXPORTADORA has substantial, continuous and

systematic contacts with the State of California, and has committed a tortious act in the State of California.

6. Defendant AVIONES DE SONORA S.A. (hereinafter "AVIONES") is a Mexican corporation, existing under and by virtue of the laws of the country of Mexico and upon information and belief doing business in the State of California and in this Southern District, and has committed a tortious act in the State of California.

7. Defendant CESSNA AIRCRAFT CO., ("CESSNA" herein) is a Kansas corporation, with its principal place of business in Kansas. Said company at all times is doing business in the State of California and in this Southern District.

JURISDICTION

8. Jurisdiction over the first claim is conferred upon this court by virtue of 28 U.S.C. 1330(a) and the Foreign Sovereign Immunities Act, 28 U.S.C. 1605(a)(2) and (5). The court has pendent jurisdiction over the other claims. Defendant EXPORTADORA'S majority share ownership is held by MEXICO, a foreign sovereign. The claims for relief arise out of the commercial activity of EXPORTADORA in the United States. The claims also are based upon an act performed by EXPORTADORA in the United States in connection with a commercial activity elsewhere. The claims further arise from commercial activity of EXPORTADORA elsewhere that has caused a direct effect in the United States, including causing the death in the United States of plaintiffs' decedents.

VENUE

9. Venue properly lies in this Court under 28 U.S.C. 1391, in that the incident out of which this matter arises occurred within the Southern District, and all defendants are corporations doing business in this Southern District, or a foreign corporation that has committed a tortious act in this

Southern District.

FIRST CLAIM FOR RELIEF
NEGLIGENCE

10. At all times herein mentioned, one RAUL GUADALUPE GUTIERREZ TELLEZ, now deceased (hereinafter "GUTIERREZ TELLEZ), was a pilot, engaged as such, in the employ of AVIONES and under the direction and control of EXPORTADORA and AVIONES.

11. EXPORTADORA and AVIONES were acting for and on behalf of each other in and about the matters alleged herein and were acting in furtherance of a joint venture or other relationship giving rise to vicarious liability.

12. At all times herein mentioned, defendant AVIONES was the owner of a certain 1980 Cessna 340A aircraft, serial no. 340A0978, and said aircraft was at all times under the direction and control of EXPORTADORA and AVIONES.

13. AVIONES was engaged in the business of providing an air taxi and air charter service. At some time on or before September 30, 1987, EXPORTADORA, while acting in the U.S., agreed with plaintiffs' decedents to provide round-trip transportation to them and engaged the services of AVIONES or entered into a joint venture or similar relationship with AVIONES, with the purposes of providing air transportation for decedents KATSUO SUGIMOTO, YOSHIHITO KODANI, HIDEO OMACHI, and two other passengers, from Guerrero Negro, Baja California, Mexico, to Tijuana International Airport, Baja California, Mexico, for purposes which were related to and in furtherance of EXPORTADORA'S business pursuits and commercial activities in the U.S. and elsewhere, and by which EXPORTADORA sought to carry out a nondelegable duty to transport round trip from San Diego, California to Guerrero Negro, Mexico, KATSUO SUGIMOTO, YOSHIHITO KODANI, HIDEO OMACHI and the other passengers who

were business visitors and clients of EXPORTADORA. OMACHI was the chief purchasing agent of a substantial customer for EXPORTADORA'S industrial salt. KODANI and SUGIMOTO were research scientists inspecting an agricultural research project that grows vegetables in the desert on the premises of EXPORTADORA'S facility at Guerrero Negro, furthering EXPORTADORA'S commercial interests of goodwill with its stockholders, the government of MEXICO and Mitsubishi Corporation of Japan.

14. On or about September 30, 1987, pursuant to and in furtherance of the above-referenced arrangements, AVIONES provided EXPORTADORA with the above-mentioned 1980 Cessna aircraft with its pilot GUTIERREZ TELLEZ for purposes of carrying out said air transportation. Because of the remote location of EXPORTADORA'S salt farm at Guerrero Negro, Mexico, the commercial activity of salt production at Guerrero Negro requires that defendant EXPORTADORA provide air transportation to business visitors and clients, such as plaintiffs' decedents. Because EXPORTADORA'S business and purchasing office in the U.S. is located in San Diego, California, defendant EXPORTADORA usually provides round-trip transportation from San Diego, California to Guerrero Negro, Mexico for business visitors, such as plaintiffs' decedents, and usually arranges said round-trip transportation in the United States.

15. EXPORTADORA represented to plaintiffs decedents, as part of the travel agreement, that EXPORTADORA would be responsible for providing the transportation. EXPORTADORA intended that plaintiffs' decedents act upon this representation and travel to Guerrero Negro and back. Plaintiffs' decedents reasonably relied on EXPORTADORA'S promise that EXPORTADORA would provide transportation, and acted on EXPORTADORA'S promise by traveling to Guerrero Negro. Plaintiffs' decedents' reliance on EXPORTADORA'S promise was reasonable, in that plaintiffs' decedents, or the colleagues or fellow-

employees of plaintiffs' decedents, had traveled round-trip to Guerrero Negro in the past with EXPORTADORA providing the transportation, and EXPORTADORA usually provides round-trip transportation for its business visitors because of the remote location of EXPORTADORA'S Guerrero Negro facility. Plaintiffs' decedents did not know, nor should they have known, that EXPORTADORA would not be responsible for the return flight. On or about September 30, 1987, EXPORTADORA substituted the chartered AVIONES airplane for EXPORTADORA'S company airplane, to carry out EXPORTADORA'S agreement to transport plaintiffs' decedents. EXPORTADORA knew that a chartered airplane might be substituted for the EXPORTADORA company airplane, and did not disclose this fact to plaintiffs' decedents at the time when the travel agreement was made. Under the circumstances, EXPORTADORA is estopped to deny that AVIONES was EXPORTADORA'S agent. EXPORTADORA is liable for the acts of AVIONES as EXPORTADORA'S agent.

16. On or about said date, the aircraft flew from Guerrero Negro to the vicinity of Tijuana Airport, and at approximately 7:56 a.m. on said day, while engaged in attempting to make an instrument approach to the Tijuana International Airport, and well in the airspace of the United States of America, said aircraft crashed in San Diego, California, killing all on board.

17. EXPORTADORA, AVIONES, and decedent GUTIERREZ TELLEZ, and each of them, were negligent about the operation, maintenance and control of the said aircraft so as to cause it to crash as alleged above.

18. By reason of the premises and as a direct and proximate result thereof, plaintiffs have been deprived of kind and loving husbands and fathers and the care, comfort, society, protection, companionship, services, support, love and affection of decedents KATSUO SUGIMOTO, YOSHIHITO KODANI, and HIDEO OMACHI all to their general damage

in a sum in excess of the jurisdictional minimum of this Court, and further damages in an unknown amount or other losses including funeral and burial expenses, the specifics of which plaintiffs pray leave to insert by amendment with the same when finally determined.

SECOND CLAIM FOR RELIEF
PRODUCTS LIABILITY

19. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 16 and 18 above set forth.

20. Defendant CESSNA was at all times engaged in the business of the design, production and distribution of aircraft into the stream of commerce and did in fact design, produce and place the Cessna 340A described above, including its component parts, into the stream of commerce at some time prior to September 30, 1987.

21. Said CESSNA aircraft, including its components, avionics and the engines therein, were defective in design and manufacture at the time they left the possession of the defendant CESSNA, and said defect or defects proximately caused and contributed to the crash of said CESSNA described herein above.

THIRD CLAIM FOR RELIEF

22. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 18, and 20 through 21.

23. Defendant CESSNA knew or had reason to know that the airplane was defective and had reason to believe that the users of the airplane would not realize its defective condition.

24. Defendant CESSNA had a duty to warn the users of the airplane of the defective condition of the airplane.

users of the airplane of the defective condition of the airplane.

25. Defendant CESSNA negligently failed to warn the users of the airplane of its defective condition. A foreseeable proximate result of defendants' failure to warn was the crash of the airplane, killing all on board.

FOURTH CLAIM FOR RELIEF

26. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 18, and 20 through 21.

27. On or about September 30, 1987, the airplane was defective. The defective condition of the airplane proximately caused or contributed to the crash of the airplane.

28. Defendant CESSNA failed to warn the users of the airplane of its defective condition, proximately causing or contributing to the crash of the airplane.

WHEREFORE, plaintiffs pray judgment against defendants and each of them, jointly and severally, as follows:

1. For general and special damages as allowed by law and according to the proof herein;
2. For prejudgment interest as may be allowed by law;
3. For costs of suit; and
4. For such other and further relief as may be proper in the premises.

DATED: August 26, 1991
Belmont, California

LAW OFFICES OF ROBIN E. FOOR

By /s/
Robin E. Foor
Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs demand that the issues herein, except those involving only defendant EXPORTADORA, be tried by a jury.

Dated: August 26, 1991
Belmont, California

LAW OFFICES OF ROBIN E. FOOR

By /s/
Robin E. Foor
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[Filed June 5, 1992]

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, et al.,	Civil No.88-1532 R(POR) Consolidated 88-1920 R(POR)
Plaintiffs,	**CONSOLIDATION ORDER**
vs.	
EXPORTADORA DE SAL, S.A. DE C.V., a foreign corporation, et al.,	
Defendants.	

On July 17, 1989 this Court entered an Order Consolidating Related Cases in Schoenberg, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1530. This case, and the case of Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1920, were consolidated with three other related cases under that consolidation order. The low number case, Case No. 88-1530, and two other cases from the consolidated cases, Hernandez,

et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1531, and Schoenberg, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1919, have been dismissed pursuant to settlement. Accordingly, the consolidation order of July 17, 1989 is modified as follows:

IT IS ORDERED, that:

1. The record in the consolidated cases under the former low number case Schoenberg, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1530, is part of the record in Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1532 and in Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1920;

2. Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1532 is now the low number case of the two related cases that remain pending, formerly consolidated under Case No. 88-1530;

3. The related cases of Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1532 R(P) and Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1920 R(P) are consolidated;

4. Only one document need be filed, in Case No. 88-1532 R(P), to serve as a filing in the two related cases, provided that the document filed in Case No. 88-1532 R(P) shall have a consolidated caption bearing the case numbers of the two related cases. The caption of this Order is an example of the consolidated caption;

5. If a document pertains to only one of the cases, that document shall be so designated;

6. Only documents having special application to particular cases need be filed separately in individual case files.

Dated: June 5, 1992
San Diego, California

/s/
John S. Rhoades, Sr.
United States District Judge

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[Filed Jan. 7, 1993]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, et al.,	) Civil No. 88-1532R(POR)
	)
	) **PRETRIAL ORDER**
Plaintiffs,	)
vs.	) Pretrial Date: January 4, 1993
	) Trial Date: January 11, 1993
EXPORTADORA DE SAL, S.A. DE C.V., a foreign corporation, et al.,	) Time: 9:00 a.m.
	) Place: Courtroom 5
	) Honorable James Fitzgerald
	)
Defendants.	)
	)

Following pretrial proceedings pursuant to Fed.R.Civ.P. 16 and Local Rule 16.1(f)(7),

IT IS ORDERED:

I.

This is an action for wrongful death on behalf of the heirs of three passengers who were killed in an airplane crash in San Diego County on September 30, 1987. The plaintiffs are citizens of Japan. The defendants are Exportadora De Sal, S.A. De C.V., a Mexican corporation ("Exportadora") and Aviones De Sonora, S.A., a Mexican corporation ("Aviones"). The accident occurred in the Southern District of California.

The pleadings which raise the issues are as follows:

1. The Fifth Amended Complaints, filed August 26, 1991 in case no. 88-1532 and case no. 88-1920;

2. Exportadora's Answers to the Fifth Amended Complaints, filed October 30, 1991 in case no. 88-1532 and case no. 88-1920.

II

Federal jurisdiction is invoked pursuant to 28 U.S.C. § 1330, 28 U.S.C. § 1605(a)(2), the Foreign Sovereign Immunities Act (the "FSIA"), and the doctrine of pendent jurisdiction. Exportadora, whose shares are majority-owned by the Government of Mexico, is included in the FSIA's definition of an agency or instrumentality of a foreign state, 28 U.S.C. § 1603(a) and (b)(2). Jurisdiction under the FSIA arises under federal law.

Venue is invoked on the ground that the claims arose in the Southern District of California, pursuant to 28 U.S.C. § 1391. In addition, Exportadora had an office in the Southern District of California.

Plaintiffs allege that this case arises out of the commercial activity of Exportadora in the United States, pursuant to 28 U.S.C. 1603(e), in that it is alleged that the passengers' round trip transportation from San Diego to Guerrero Negro and back was arranged through the San Diego office of Exportadora, it is alleged that the claims arise out of the commercial activity of Exportadora in the United States, including the transportation of passengers in

San Diego. It is also alleged that the claims arise, pursuant to 28 U.S.C. 1605(a)(2), from the commercial activity of Exportadora elsewhere that has caused a direct effect in the United States, including the deaths of plaintiffs' decedents.

III.

The following facts are admitted and require no proof:

1. These cases arise out of the crash of a small aircraft in the United States as the aircraft approached Tijuana Airport. The plane was on route to Tijuana from Guerrero Negro, Baja California.

2. Defendant Exportadora selected defendant Aviones to transport five passengers, to transport mail, and to pick up two Exportadora employees at Tijuana Airport for return to Guerrero Negro. On approach to Tijuana Airport through United States airspace, the plane encountered bad weather and struck the ground north of the United States - Mexican border. All five passengers and the pilot were killed. The plaintiffs in these cases are the passengers' survivors.

3. Exportadora is a corporation formed under the laws of Mexico and is 51% owned by the United Mexican States ("Mexico") and 49% owned by Mitsubishi Corporation ("Mitsubishi") of Japan.

4. Exportadora manufactures salt by evaporation from seawater at Guerrero Negro and sells it on domestic and international markets. Exportadora is one of the world's largest producers of industrial salt, manufactured at Guerrero Negro. Exportadora produces about six million metric tons of salt per year, shipped by bulk carrier to world markets. By airplane, Guerrero Negro is about 312 nautical miles south of San Diego, California.

5. Exportadora also had an office in San Diego in 1987. Exportadora maintained this San Diego office from 1974 until 1991. The San Diego office handled purchasing, communications, and shipping or transportation necessary for Exportadora's enterprise.

6. Exportadora set up a telex between the two offices. Some communications between Guerrero Negro and the outside world were communicated through the San Diego office.

7. There are no regularly scheduled commercial flights from the San Diego area to Guerrero Negro. Exportadora often transported employees and other passengers between the two offices. An Exportadora corporate aircraft often flew round trip between Guerrero Negro and Tijuana Airport. To complete the trip to San Diego, an Exportadora van from the San Diego office would generally drop off or pick up passengers at the Tijuana Airport. Exportadora's corporate aircraft was a private airplane. Exportadora's company airplane was not offered for use by any member of the public. Transportation on the company airplane was limited to company employees and other passengers who made arrangements to travel with the company.

8. Arrangements were made with Exportadora for transportation from San Diego to Guerrero Negro for the decedents. The decisions to allow the passengers to travel aboard Exportadora's vehicles were made in Guerrero Negro. The decedents were located in Japan when these transportation arrangements were made. Other passengers located in California made arrangements to travel on the same flights.

9. At the beginning of the trip, the passengers were picked up by the Exportadora van in San Diego and driven across the border into Tijuana for the flight south. Upon their return, the same van was to pick the passengers up at the Tijuana Airport and take them back to San Diego.

10. The company plane was unavailable on the day of the return flight, so Exportadora selected Aviones to fly the passengers on their ill-fated trip to Tijuana.

11. In addition to plaintiffs' decedents, there were two other passengers on board the airplane that crashed, Mr. Schoenberg and Mr. Hernandez.

12. Two of the plaintiffs' decedents, Dr. Sugimoto and Dr. Kodani, visited an agricultural station located next to

Exportadora's facilities as representatives of Tottori University in Hamasaka, Japan. The university is conducting an agricultural project on land located in Guerrero Negro. The project is studying the growing of vegetables in the desert using drip irrigation and fertilization systems.

13. Dr. Sugimoto and Dr. Kodani were professors at Tottori University. On September 18, 1987, Mr. T. Matsushita of Mitsubishi Corporation in Tokyo sent a telex to Exportadora stating that Dr. Sugimoto and Dr. Kodani would be visiting Guerrero Negro on September 23, 1987 to September 30, 1987. A true and correct transcribed copy of the telex sent by Mr. Matsushita is part of exhibit 70-25. Mr. Matsushita requested that Exportadora arrange transportation "between SAN/GN" for Dr. Sugimoto and Dr. Kodani by "pick up truck/company plane".

14. Dr. Sugimoto and Dr. Kodani arrived in San Diego on September 22, 1987 and were met at the airport by Ms. Mikiko Izumi, an Exportadora employee. Exportadora arranged and paid for their accommodations at the Executive Hotel in San Diego. On Wednesday, September 23, 1987, Dr. Sugimoto and Dr. Kodani were picked up in San Diego by Exportadora's company van and transported to Tijuana Airport. At Tijuana Airport, they boarded the Exportadora company airplane for the flight to Guerrero Negro. Their flight to Guerrero Negro, and their stay at the company's guest quarters in Guerrero Negro, was at Exportadora's expense.

15. On September 4, 1987, Mr. T. Matsushita, an employee of Mitsubishi in Tokyo, Japan, sent a telex to Exportadora requesting that Exportadora receive as a guest Mr. H. Omachi, of Asahi Chemical Ind. Co. Ltd. ("Asahi"), manager of the raw materials section of the purchasing department. The telex stated that Mr. Omachi wished to visit the salt field. The telex requested that Mr. Omachi travel from San Diego to Guerrero Negro and back "by car/co plane". The telex stated that Asahi was purchasing the fourth largest volume of salt and was one of the most important customers for salt. A true and correct copy of a transcription

of the telex from Mr. Matsushita is part of Exhibit 70-34. Exhibit 70-34 also contains additional internal company addressing added by Exportadora.

16. Mr. Omachi was planning a business trip to the United States and wanted to visit and inspect Exportadora's facilities.

17. Mr. Omachi was a purchasing agent for Asahi. Purchasing salt was part of his work. Asahi is an indirect customer for Exportadora's salt. Mr. Omachi met with employees of Exportadora while in Guerrero Negro. Mr. Omachi also flew down to Guerrero Negro at Exportadora's expense.

18. Manuel Guzman was the Exportadora manager in charge of the San Diego office in September 1987. Mr. Guzman's secretary received a request to transport Mr. Omachi. Mr. Guzman's secretary contacted Guerrero Negro to arrange the transportation for Mr. Omachi. Mr. Omachi's travel schedule was confirmed by several telexes addressed to the San Diego office.

19. Mr. Omachi was met at San Diego airport on September 27, 1987 by Mr. Shigeaki Kadomukai, an employee of Baja Bulk Carriers, S.A. ("Baja Bulk"). Baja Bulk is owned by the stockholders of Exportadora and ships most of Exportadora's salt.

20. Exportadora's San Diego office made a reservation for Mr. Omachi at the Westgate Hotel. Mr. Omachi stayed at the Westgate Hotel the evening of September 27, 1987. Exportadora paid Mr. Omachi's hotel bill.

21. On September 28, 1987 Mr. Omachi traveled in the Exportadora van from San Diego to Tijuana Airport, where he boarded the Exportadora corporate jet for the flight to Guerrero Negro. At Guerrero Negro, Mr. Omachi stayed in Exportadora's guest quarters at Exportadora's expense.

22. The Tijuana Airport lies near the border between the United States and Mexico. At the time of the crash, a Letter Agreement ("Letter Agreement"), dated June 15, 1983, existed between the United States air traffic control facility

in San Diego ("San Diego TRACON") and the air traffic control facility for Tijuana Airport ("Tijuana Approach"). The aircraft crashed just north of the border, killing all on board.

23. Exportadora arranged for round trip transportation between Guerrero Negro and San Diego for each passenger.

24. When Exportadora agreed to provide transportation to its facilities in Guerrero Negro, a passenger would often arrive at the San Diego office of Exportadora, or at a hotel in San Diego, and Exportadora would provide transportation from San Diego to Guerrero Negro and back.

25. The company airplane in September 1987 was a 10 passenger jet aircraft, with two pilots, a West Wind 1123.

26. Exportadora had a Board of Directors meeting in Mexico City on September 28, 1987. The company airplane was sent to Mexico City from Guerrero Negro on September 29, 1987, in connection with the Board of Directors meeting. On September 29, 1987 the company airplane was not available for the return flight from Guerrero Negro to Tijuana. Exportadora selected a flight from Aviones.

27. Exportadora selected Aviones for the return flight due to the unavailability of its own aircraft.

28. The day before the flight, the San Diego office was informed by telex that Aviones was selected for the flight the next day, and was informed of the schedule for an early morning arrival of the flight.

29. The flight departed early in the morning because of Mr. Omachi's travel schedule.

30. Enrique Achoy, an Exportadora employee, acting in the course and scope of his employment, selected Aviones for the flight. Mr. Achoy arranged for a twin-engine, Cessna 340A, airplane to fly the passengers from Guerrero Negro to Tijuana, with an approximate departure time of 6:00 a.m. and approximate arrival time of 8:00 a.m. The Aviones flight was arranged by Exportadora at Exportadora's expense.

31. Aviones is an air taxi company and a Mexican common carrier. Aviones advertised in the 1991 Hermosillo, Sonora phone book that it conducts flights in all of the

Republic of Mexico and part of the United States.

32. The passengers were not given any tickets for the flight.

33. The Aviones airplane arrived in Guerrero Negro from Hermosillo, Sonora on September 29, 1987. Hermosillo is about 172 nautical miles from Guerrero Negro by airplane.

34. The pilot of the Aviones airplane was Raul Gutierrez Tellez ("Gutierrez").

35. Mr. Achoy told the pilot that the destination of the flight was Tijuana.

36. On September 30, 1987 at about 6:00 a.m. the passengers boarded the airplane. At that time the passengers knew, if not earlier, that the airplane they were traveling aboard was not the same airplane they had travel aboard to Guerrero Negro. Prior to allowing the passengers to board the plane, the pilot weighed the baggage of each passenger.

37. The airplane departed Guerrero Negro about 6:10 a.m.

38. On route to Tijuana, Mexico, the pilot contacted Tijuana Approach Control and was told that the airport's operations were restricted because of fog.

39. Tijuana Airport is equipped with radar.

40. The instrument landing system ("ILS") approach to runway 090 at Tijuana Airport uses United States airspace. The pilot began an approach to Tijuana Airport's runway 090.

41. Tijuana Airport is located on the top of a mesa, about 499 feet above sea level. The approach to runway 090 is above a deep valley which ends with the hill where the airport is located.

42. The airplane impacted the hill on which the airport is located, below the level of the airport, about 389 feet above sea level. The airplane was torn apart by impact forces, killing all on board.

43. The accident occurred at 7:56 a.m.

44. At the time of the accident, the Exportadora van was waiting for the passengers at Tijuana Airport, to take the passengers to the San Diego office of Exportadora.

45. At the time of the accident, visibility at Tijuana Airport was less than the minimum visibility required for an instrument landing, and one tenth of a mile or less.

46. The pilot was sober at the time of the accident and did not have any alcohol, drugs, carbon monoxide, or other intoxicants in his blood.

IV.

The reservations as to the facts recited in Paragraph III above are as follows:

1. With respect to Section III, paragraphs 2, 26, 27, and 30, Exportadora reserves its contention that the appropriate wording is that Exportadora retained Aviones, rather than selected Aviones.

2. With respect to Section III, paragraphs 2, 26, 27, and 30, plaintiffs reserve their contention that the appropriate wording is that Exportadora chartered a flight from Aviones.

* * * *

[RT I 47:13 - 52:4]

Immediately following Defendant's
Opening Statement

THE COURT: I do have some questions and comments, and the reason I do that is because, having listened to the opening statements, I want to be sure that, while I'm not precluding evidence on issues, that at this moment I perhaps do not consider to be critical.

I do wish to suggest issues which I think are critical and which should be focused on.

Now, I realize that, Mr. Greco, you haven't been in this case except for the last year, but I have given considerable attention to the case of Schoenberg vs. Exportadora, 930 F.2d 777, Ninth Circuit (1991), a case which decided some issues in this case. That appeal decided some issues in this case.

Early in your argument you said that there's no evidence that Exportadora maintained a regular air division or air service. The District Court earlier -- Judge Irving found that Exportadora maintained a regular air and auto link between its San Diego and Guerrero Negro office as part of its commercial operations, that it arranged through its San Diego office round-trip transportation for the decedents from San Diego to Guerrero Negro and that all five decedents began their trips to Guerrero Negro in San Diego.

Those findings are critical to the conclusions reached by the Court of Appeals, and I will not review those. Those findings will be accepted in the trial of this case.

There were other findings made by Judge Irving such as,

> "The District Court did not clearly err in finding that Exportadora arranged transportation of the decedents to and from Guerrero Negro and transported them. Arranging transportation and transporting people is not an act that only a sovereign could perform.

> Exportadora engaged in commercial activity in arranging transportation for its prospective business partners."

Now, if those findings were dicta, I would not give them the importance that they have in this case, but they're not dicta because, in connection with the findings that I referred to in the first instance, the Court of Appeals went on to say,

> "Given these findings, the District Court correctly concluded that relevant activity was the round trip. The decedents did not make arrangements for legs of the trips separately. They made round-trip arrangements through the San Diego office at the outset, we consider the arranged travel a whole."

Now, I realize that the Plaintiff in this case relies on various theories of -- in which Exportadora is responsible for the activities of the air taxi operator.

The -- those issues relating to responsibility; that is, agency, I understand are in conflict and will have to be resolved here in connection with the defense raised that the air taxi operator was an independent contractor for which Exportadora has no responsibility.

But I do want both sides to understand that what the findings are that have been relied upon by the Court of Appeals in making its decision on the issues which were resolved in 1991 by the Court of Appeals, I do not intend to review and will accept that -- those findings as established.

So that then brings us to another important issue which I think is factual and has to be resolved, and that is the cause of the tragedy, the impact of the Cessna below the height of the runway 090 at Tijuana.

The Plaintiff contends that this is pilot error. The Defense contends this is air controller error, and certainly that will have to be resolved.

So what I'm suggesting to you is that, while there may be many issues in this case, certainly the critical issues will be

the proximate cause of the collision; was it the fault of the pilot; was it the fault of the air traffic controller -- and in addition the ultimate responsibility for Exportadora for arranging the transportation of the five decedents by aircraft as part of its commercial activity from Tijuana, returning to Tijuana and the bus transportation which was aborted from San Diego to Tijuana.

We'll take a few minutes now, gentlemen, and then we'll begin with the witnesses.

MR. GRECO: Your Honor, when you return, I'd just like to address one brief point. Perhaps I misspoke.

THE COURT: Sure.

MR. GRECO: Shall we --

THE COURT: No, I'm -- there's been a lot of -- there have been -- from what's been said to me in the opening statements, considerable disagreements like the -- there'll be an issue raised which may not -- I don't know if it'll be dispositive, but I believe that the Defense is standing on the theory that, in the course of this litigation, that there have been certain admissions made which now preclude the taking of positions which are advocated at the present time in this litigation.

The question will be whether these are really constituted missions [sic. admissions] or whether or not they furnish the basis of impeachment for positions now taken.

I --

MR. GRECO: I understand that, your Honor. The only thing I wanted to make clear was that I was not suggesting that Exportadora does not run aircraft between Guerrero Negro and Tijuana. That's not what I meant to say, if I said it.

What I was saying was it is not the repeated practice that Mr. Foor would have this Court believe that Exportadora shuttles vendors or business visitors back and forth.

THE COURT: Well, I merely pointed out that the Court of Appeals found that -- or agreed with the finding that the underlying -- that the underlying records that stood

at that time, at least before Judge Irving, was sufficient for him to find that it was regularly conducted.

MR. GRECO: Thank you, your Honor.

THE COURT: We'll take a 10-minute recess.

[Emphasis added.]

* * * *

[RT I 78:18 - 81:17]

DOLIAS - DIRECT

Q Does Exportadora de Sal have a post office box in San Ysidro, California?

A Yes --

MR. GRECO: Objection, your Honor -- excuse me. Irrelevant.

MR. FOOR: Your Honor, this pertains to jurisdiction.

MR. GRECO: Your Honor, we're not disputing jurisdiction, and I don't mean to be hypertechnical, but in the interest of saving time, in light of that, I just fail to see the relevance of this testimony at all.

THE COURT: What will it show, Mr. Foor?

MR. FOOR: Well, your Honor, it will -- it will show --

THE COURT: Are you satisfied with his agreement?

MR. FOOR: Well, your Honor, I'm not going to dispute what Counsel just said; however, jurisdiction could be raised at any time, and I think that it's -- unless Counsel is stipulating for all time and all purposes to jurisdiction both for purposes of the Foreign Sovereign Immunities Act and for the purposes of due process --

THE COURT: I thought that was resolved in the decision of the Ninth Circuit that jurisdiction arises here under the -- under the act and that there was some disagreement with the earlier position taken by the Plaintiff that -- in which the court resolved by saying the Federal common law applied, that certainly -- I haven't perceived any issue relating to jurisdiction based on the opening statements and certainly based on the resolution made by the Court of Appeals --

MR. GRECO: Yes, your Honor. I'm making this objection now -- not only because this person has been subpoenaed to testify, but Mr. Foor's also subpoenaed the DMV records and so forth.

I think I'll save us all a lot of time if the Court concurs with my position -- in personam jurisdiction is established. My clients have appeared.

Subject matter jurisdiction has been established, I'm told, by the Ninth Circuit. We don't dispute that; we're not taking it to the Supreme Court.

THE COURT: It'll save you a lot of time, I think, Mr. Foor. There's no contest on jurisdiction here.

MR. FOOR: Your Honor, my -- another purpose for these documents is to show that there was a business purpose for the airplane and it is in effect --

THE COURT: I --

(Pause.)

MR. GRECO: While you're thinking about that one, then another objection on the cumulative effect of this person's testimony -- I'm quite certain you'll be hearing identical questions from other witnesses including this one and, again, your Honor, not to be hypertechnical -- I'm aware of the fact that you don't like objections, but if we lay out some ground rules --

THE COURT: No, no, that's fine --

MR. GRECO: I'm sorry --

THE COURT: I'm not -- all I wanted were -- was to resolve objections, but I still like to focus on the issues here. I don't think there's any issue at all relating to jurisdiction here, either jurisdiction of this Court or subject matter jurisdiction.

So we'll -- I'll make -- unless there's an objection, I will make that finding, that based on the statements made, the Ninth Circuit decision that there is -- that this Court has both -- has jurisdiction over the parties and has subject matter jurisdiction. Is that agreeable to both sides?

MR. GRECO: It is so stipulated, your Honor.

THE COURT: Mr. Foor, will that resolve --

MR. FOOR: Well, yes, your Honor. Of course we have the burden of establishing jurisdiction if --

THE COURT: Oh, I know, but I think it's --

MR. FOOR: If Exportadora is stipulating to

jurisdiction, then I certainly have no disagreement with that.

[Emphasis added.]

* * * *

[RT I 84:14 -85:14]

THE COURT: What are the dates of the -- you see, your friend may have an objection on relevancy. Whatever -- my understanding here -- you're offering this in contention -- your argument on jurisdiction.

MR. FOOR: Yes, your Honor.

THE COURT: All right. And I said in the course of the conference that we just had, whatever the circumstances were concerning the status of Exportadora, contemporaneous with the events which bring us to this trial, it may well be relevant, and I believe that that has been resolved by the Court of Appeals and now is a non-issue in view of the court's conclusion that Exportadora was engaged in commercial activity in arranging transportation for its prospective business partners, and I don't think this is -- I don't think that issue is any longer open, but in order to support that proposition, I will allow the documents that were reasonably contemporaneous -- the documents which relate to Exportadora's present status in the United States, I will find it relevant, so that's the distinction I'm making.

Mr. Greco, I may well want to make that distinction, and although I've said to Mr. -- I've said to both sides that, even if I find them relevant, those documents that relate to the present status of Exportadora may be offered -- made as an offer of proof and will not be received but will be made part of the record.

[Emphasis added.]

* * * *

[RT III 3:4 - 8]

And so, without beating it to death, we agree that law of the case applies here with respect to the choice of law -- that is, California law -- and with respect to the fact that the Court's jurisdiction is established notwithstanding a prior claim of sovereign immunity.

[Emphasis added.]

* * * *

[RT VII 32:19 - 33:20]

GUZMAN - DIRECT

MR. GRECO: Your Honor, in this courtroom on three occasions at least, on the record, I have stated we stipulate that there was subject matter jurisdiction based on the Court of Appeals findings; we certainly stipulate that there was in personam jurisdiction; otherwise, we'd not at all be here today.

So I have no intention whatsoever of relitigating subject matter jurisdiction or in personam jurisdiction.

MR. FOOR: As your Honor knows, jurisdiction cannot be conferred by stipulation. There must be evidence. It's part of Plaintiff's burden.

THE COURT: We passed that long ago. I advised both counsel that we are not reviewing the facts and findings relied upon by the Court of Appeals in order to arrive at its legal rulings that the courts of the United States have jurisdiction of this matter -- both over the parties and subject matter and that issue will not be revisited and indeed your friend has told us that he does not intend to quarrel with that ruling, at least at this level.

MR. GRECO: Not only do I not intend to quarrel with it at this level; I intend to quarrel with it at no level, and I'll represent to the Court that past counsel in this case, Mr. John Stephens, has advised me that he doesn't intend to

quarrel with the jurisdictional finding as well as the choice of law decision made.

[Emphasis added.]

* * * *

[RT VI 72:2 - 72:6]

BREMER - DIRECT

Q Now, it's true, isn't it, that the Government of Mexico encouraged you to assist the agricultural project?
A That is correct. The Government of Mexico, through the CFM, the mining commission in Mexico, which was dealing and deals with Japan, asked us to assist them. That's correct.

* * * *

[RT VI 80:15 - 80:17]

Q And is the production from the agricultural projects sold through the company store?
A What that little piece of land produces, yes . . . .

* * * *

[RT VI 80:21 - 80:25]

Q And does the company consume part of the production from the agricultural project in the company dining room?
A When we have guests we have -- if the vegetables are really good, they're not fumigated, they're not poor quality, yes, we could use them in the restaurant . . . .

* * * *

[RT VI 92:18 - 93:13]

Q And then Guerrero Negro would telex San Diego saying than it was okay for that passenger to travel?
A Either telex or phone.
Q And then the passenger would then confirm to San

Diego that they would be travelling?
A Yes. If they didn't get there at 10:00 o'clock in the morning, or whatever time the plane was leaving, they would be left behind. But they would normally, naturally, if they had been told they could go down, they would come over here [San Diego] and, if they hadn't been to the Tijuana airport before, they'd probably get a ride through the San Diego office.
Q And that would be in the Exportadora company van?
A It could be the company van or Mr. Guzman's car.
Q In this case, when the Japanese scientists requested to travel through the San Diego office, did you say that it was okay for them to travel?
A I don't recall if I said it was okay. I probably heard they were going down there and if there was room I had no objection at all. At that time they were authorized -- I don't recall if I'm the guy that said it, but -- or they probably went through my R&D department.

[Emphasis added.]

* * * *

[RT VI 97:16 - 98:7]

Q Let me ask a more narrow question, Mr. Bremer. Was it a regular practice, that is, a routine activity, for Exportadora to transport passengers round trip from San Diego to Guerrero Negro?

MR. GRECO: Object; ambiguous as to "passengers", your Honor. And by that I mean passengers could mean --

THE COURT: He's objecting to the generic term "passengers". I'll allow the generic term to be used. Go ahead.

THE WITNESS: Most likely, yes, we would transport them to and from, if they requested such transportation.
BY MR. FOOR:
Q And it's true that the regular practice was that they would be transported round trip from Tijuana to Guerrero

Negro in the company airplane.
A On our company plane or on an air taxi if we didn't have a company plane.

[Emphasis added.]

* * * *

[RT VI 98:25 - 99:6]

Q And it's true that the Exportadora van regularly went from San Diego to Tijuana carrying passengers and mail, correct?
A If there was a flight and there was somebody coming from the San Diego side, yes, the company van would go to the Tijuana airport. Not necessarily every time, but whenever it was necessary, yes, they would.

* * * *

[RT VI 126:16 - 127:4]

Q Mr. Bremer, as to Exhibit 70-28, the call letters XAKUV, do those call letters refer to a charter flight?
A That would most likely refer to an air taxi, yes, sir.
Q This air taxi referred to in 70-28 was a company flight, was it not?
A Well, it must have been arranged by the company, yes.
Q Arranged and provided by the company for the passengers.
A If our plane was out of service, we most likely requested an air taxi. The same thing on 29. That's an air taxi.
Q So, again, that would be an air taxi that would be a company flight that day.
A It would have been arranged by the company, yes.

[Emphasis added.]

* * * *

[RT VI 130:24 - 131:3]

Q Mr. Bremer, it's true, isn't it, that the Aviones charter flight was a substitute for the Exportadora company airplane?

A Most likely it was, yes. There was no company plane so they looked for an air taxi to substitute.

[Emphasis added.]

* * * *

[RT VI 144:16 - 146:3]

Q Now, referring to 70-44 and -- actually, 70-41 and then 70-44 -- Mr. Bremer, do you know whether Mr. Omachi's transportation was arranged through the San Diego office by Mr. Guzman's secretary?

(Pause.)

A San Diego may have arranged to receive him here in San Diego, yes.

Q And Doctor Sugimoto's and Doctor Kodani's transportation was also arranged through the San Diego office, wasn't it?

MR. GRECO: Your Honor, again, this is cumulative of the pretrial order. These telexes are already referred to, not only for Mr. Omachi, but for --

THE COURT: It is cumulative, isn't it? I ordinarily don't sustain objections on cumulative, but this has been all covered.

MR. FOOR: No, your Honor. There's been no stipulation about this. The pretrial order refers to a telex sent from Mitsubishi to the San Diego office of Exportadora but I don't believe that Counsel has stipulated that their transportation was arranged through San Diego.

THE COURT: I thought there had been considerable testimony given as to how these arrangements were made by earlier witnesses. But you may have the question.

THE WITNESS: Here I'm reading what I received.

Mr. Omachi most likely was received and taken to Tijuana by the San Diego office. Most likely we received him down there. The other people, I don't recall how they made their arrangements exactly, if they went through the San Diego office, if they went down in the company plane. I know they came back in the company plane, but I don't recall exactly how they -- I don't recall.

(Pause.)

BY MR. FOOR:

Q In the ordinary course of business the flights for Mr. Kodani and Mr. Sugimoto also would have been arranged through the San Diego office, correct?

A Could have been.

[Emphasis added.]

* * * *

[RT VI 147:3 - 147:13]

Q All right. Looking at Exhibit 70-62, that indicates that Doctor Sugimoto, Doctor Kodani, and Mr. Omachi all had their return travel scheduled on the company plane, isn't it?

A That's correct, on Wednesday the 30th. They're on the list.

Q And 70-62 is the schedule for the company airplane, isn't it?

A This is the list or schedule that the people in the administrative department draw up and make for the full week.

[Emphasis added.]

* * * *

[RT VI 154:12 - 154:21]

Q But it's true, isn't it, that in 1987 the Japanese scientists traveled by airplane from Tijuana to Guerrero Negro?

A In that particular time, yes, sir.

(Pause.)

Q Directing your attention to Exhibit 70-5, the specific request for Japanese scientists, for example Doctor Takeuchi and Doctor Toyama, was a request for transportation on company flights.

A That's correct.

[Emphasis added.]

* * * *

[RT XII 34:22 - 35:6]

BREMER - DIRECT

Q All right. Now, in this telex it refers to company plane or pickup truck with respect to transportation; do you see that?
A That is correct.
Q Explain to your Honor what your understanding of what that means is, if you have an understanding.
A It's a -- if we have an airplane -- if there's room on an airplane available, if we could please take them down by plane -- take them down. If not, take them down by pickup truck.

* * * *

[RT XII 15:22 - 16:17]

Q Now, it's true, isn't it, that Exportadora generally provided free air transportation on its company-owned aircraft for the scientists on the agricultural project in 1987 prior to the time of this occurrence?
A That's correct.
Q And the scientists were included on the regular flights on the company airplane?
A If they requested and there was room, yes, they were transported.
Q And it's true, isn't it, that the communications for the travel arrangements for the Japanese scientists and for Mr. Omachi were channeled through the San Diego office of Exportadora?
A That's correct.

[Emphasis added.]

* * * *

[RT XII 81:12 - 81:15]

Q Mr. Bremmer, do you know where the request for Mr. Omachi's travel originated? Whether it originated with Mr. Omachi, or whether it originated at Mitsubishi?
A It originated at Mitsubishi.

* * * *

[RT XII 81:25 - 82:3]

Q Do you know whether the requests for the Japanese scientists to visit Exportadora originated with the Japanese scientists -- with them contacting Mitsubishi?
A Most likely, yes.

* * * *

[RT XII 83:24 - 84:7]

Q Did you approve the transportation for Doctors Sugimoto and Kodani?
A I don't recall if I approved -- well, if I didn't disapprove it, then my department approved it.
Q And, then, do you know whether your department then communicated their approval to the San Diego office?
A Most likely they -- not necessarily my department, probably the administrative department communicated with the San Diego office and told them okay, put them on the list.

[Emphasis added.]

* * * *

[RT XII 84:16 - 87:1]

Q I'd like to show you a document that's been marked as Exhibit 80 in this matter. This is an excerpt from Mr. Guzman's deposition. Do you agree with Mr. Guzman's

statement that in every case where the company provided one-way transportation, the company provided round-trip transportation?

THE WITNESS: Well, every time that they requested transportation they were taken down there, and we brought them back, naturally. How we brought them back, that's a different story, but they were -- naturally you try and bring the person back.

BY MR. FOOR:

Q All right, and it's true, then, in this case the passengers were transported round trip by Exportadora?

A I assume they were.

Q And the Aviones charter flight was acting for Exportadora in transporting these passengers?

A Well, when the company plane was not available then the administrative department called in an air taxi to return them.

Q All right. So, the Aviones charter flight was a substitute for the Exportadora company airplane?

MR. GRECO: Objection; calls for a legal conclusion, your Honor. What he's trying to do, if I may, is bring this -- use this phraseology of substitute from that Croche [sic. Croce] decision, and I think that's a legal conclusion; that's the basis of my objection.

THE COURT: I understand the basis of your objection. He may testify in lay terms --

MR. GRECO: Fine.

THE COURT: -- as to what the arrangements were made.

MR. GRECO: Thank you.

THE COURT: You may answer.

THE WITNESS: Well, the plane -- not having the company plane -- it rented an air taxi to return its passengers back to Tijuana.

BY MR. FOOR:

Q All right, and it was Exportadora that arranged the air taxi as a charter flight?

A Arranged the air taxi to go to Guerrero Negro and

stay overnight and leave the next day; that's correct -- Exportadora.

Q All right, and the passengers themselves did not arrange this air taxi?

A That is correct.

Q And the air taxi was acting for Exportadora in transporting these passengers?

A We rented the air taxi, and we paid for the air taxi.

[Emphasis added.]

* * * *

[RT XII 95:19- 99:2]

Q Now, it's true, isn't it, Mr. Bremmer, that Exportadora assisted the agricultural project at the request of the Government of Mexico?

A In those days there was contact with the CFM, but it was still not JICA. JICA is the project that definitely is working there now; they are -- this would be some request from the Government from the Mining Commission of Mexico ["CFM']. In those days it was a total university professors, and they were -- we had -- Exportadora had agreed to let them test their methods of planting in the desert; so, the Government of Mexico -- unless the company is considered the Government of Mexico because it's 51 percent Government -- we let them come in, and we let them use the company plane, if they requested it, and there was room available.

Q All right. I'd like to read to you from Exhibit 72-2, a declaration by Mr. Guzman, of February 22nd, 1989, beginning at page two, line 22, and I quote,

> "Although Exportadora has no involvement in the experiment, it has been encouraged by the Government of Mexico to assist the Japanese as a courtesy to its co-stockholder in Exportadora and Tottori University."

A Not necessarily. He wouldn't know that -- I don't think -- he was not involved in the project, and it was the Japanese partners, yes, that invited Tottori, and Exportadora that accepted them in those days. Naturally, the Government of Mexico knew about it because being that it was an agricultural product -- an agriculture -- it wasn't salt making, then the report that they developed, these Japanese gentlemen, or agricultural people, we did supply -- we did give copies to the Agricultural Department of Mexico, but they didn't order us to do things.

Q It was not an order from the Government of Mexico?

A No.

Q I'd like to read to you from the deposition of Manuel Guzman of May 1, 1989, at page 52, beginning at line 1,

> "Question: You were saying the Mexican Government has, but Exportadora has no connection with the project?
> Answer: By instructions from the Mexican Government we provide them with some assistance."

And beginning at line 12,

> "Question: What kind of assistance does Exportadora provide?
> Answer: Something they require of us for parts, water, electricity.
> Question: And Exportadora does that at the request of the Mexican Government?
> Answer: Yes, it does."

A Well, he's referring -- see, we're all mixing up the Government -- this agricultural project. If it's Tottori, yes, we signed an agreement with Commission Munteminero (phonetic) and the Japanese Government, JICA, was signed, I think, in 1988, the agreement -- the formal agreement for a five-year research. But prior to '88 this was the University of Tottori that was doing the experimentation down

there -- professors from the University requested by Mitsubishi. Exportadora, yes, it is a Mexican-Government company, we were assisting the professors, we did accept them to go down there and do their experimenting. So, you can -- it's very easy to confuse now, after the formal agricultural project, after '87, and the intent or the initiation of this for the studies being done by Tottori before '87 -- before '88. So, many people don't know we didn't have a contract. Mr. Guzman and I up here didn't know whether there was a contract or no legal contract between CFM and the Mining Commission of Mexico and JICA, for example, in which Exportadora was involved as being the Government salt field operating in Baja; so, therefore, we were requested to give some -- this assistance, which we do give this assistance to them.

Q All right. So, is Mr. Guzman's testimony accurate that there was a request by the Government of Mexico before 1987 or during 1987 that Exportadora assist the agricultural project?

A There could have been a request from the CFM, "Okay, keep studying this agriculture" -- there could have been, I'm not -- there were no orders given, but there could have been the request, and Mitsubishi was interested in these professors studies of the desert; so, it's not a lie -- I mean, he -- it could be correct, but formally, in '88 we signed it.

[Emphasis added.]

* * * *

[RT XII 108:8 - 108:24]

Q Now, a customer visiting Exportadora's facility -- that benefits Exportadora either immediately or ultimately; doesn't it?

A It could benefit.

(Pause.)

Q And Exportadora did accept the request for Mr. Omachi to visit Guerrero Negro?

A Yes, apparently it did -- yes.
Q And Exportadora agreed to transport Mr. Omachi to Guerrero Negro?
A Apparently they did, yes.
Q And Exportadora accepted the request for Doctors Sugimoto and Kodani to travel to Guerrero Negro?
A Yes, they did accept it.
Q And Exportadora agreed to transport Doctors Sugimoto and Kodani?
A If it said they did, they did, yes.

[Emphasis added.]

* * * *

[RT XII 109:9 - 109:11]

Q All right, and assisting the agricultural project as requested by Mitsubishi also provides stockholder goodwill?
A Well, I would imagine so -- it could.

[Emphasis added.]

* * * *

[RT XII 183:19-184:11]

ACHOY - DIRECT

Q What discussions did you have with the pilot on the evening of the 29th of September in the year 1987?
A The only thing was that fuel had been loaded, and he told me that it was fine in order to get to Tijuana - - that there was enough, and I told him if the weather is bad, as a comment, that he could go to Mexicali.
Q All right. Now, with respect to the 6:00 a.m. departure time was it the pilot that made the decision to depart at 6:00 a.m.?
A Yes.
Q All right, and you - - as I understand your testimony you told the pilot that the airplane was to go to Tijuana, correct?
A Yes.
Q And could you tell us again what you told the pilot about Mexicali?
A I told him as a comment that if conditions were not good there in Tijuana, that he could go to Mexicali.

[Emphasis added.]

* * * *

[RT XIV 9:17 - 9:25]

ACHOY - CROSS

Q Now, the company airplane made a regular Monday, Wednesday, Friday round trip from Tijuana to Guerrero Negro.
A Yes.
Q And the regular morning flight was from Guerrero Negro to Tijuana.
A Yes.
Q And this flight was the regular Wednesday morning

company flight.
A Yes.

[Emphasis added.]

* * * *

[RT XIV 15:22 - 16:17]

Q Why did you send Exhibit 70-66 to the San Diego office?
A I would send it to Gerardo Luna (phonetic) because it was the schedule.
Q You also sent a copy of 70-66 to Manuel Guzman in San Diego, correct?
A Yes.
Q Why would you send a copy to Mr. Guzman?
A Because the telex automatically sent copies to all the offices. It was a procedure.
Q So it was a standard procedure for any company flight?
A Yes.
Q And the company would have a van waiting, for example, at the Tijuana airport, as in this case, for the passengers.
A Yes.
Q Whenever there was a company flight, Exportadora would tell the pilot when to depart, correct?
A Yes.
Q And you would tell the pilot to carry certain passengers, since not everyone was allowed to travel, only those invited by Exportadora.
A That is so.

[Emphasis added.]

* * * *

[RT XIV 17:9 - 17:18]

Q In this case, for example, you told the pilot to pick up passengers in Tijuana.
A Yes.
Q And then part of the standard procedure was to prepare a passenger manifest as a list of passengers.
A Yes.
Q And that was done for any company flight.
A Yes.
Q And it was done for this flight.
A I do not recall.

* * * *

[RT XIV 38:3 - 38:8]

Q And Aviones was selected because the company airplane was not available?
A Yes.
Q And Aviones was acting for Exportadora in transporting these passengers?
A Yes.

[Emphasis added.]

* * * *

[RT XIV 38:22 - 39:1]

Q But you know that they were scheduled to go back on it [the company airplane].
A According to the information on the telex.
Q And the only reason that they were on a charter flight was because the company plane was not available.
A Yes.

* * * *

[RT XIV 41:4 - 41:13]

Q Now, you mentioned that after you met the pilot, you went to the company dining room.
A Yes.
Q Would you describe the scene that evening, September 29th, in the company dining room?
A Yes.
Q Who was present?
A We went through the kitchen door. A group of Japanese were having dinner to my left. I approached them and I introduced the pilot.

* * * *

[RT XIV 53:7 - 53:14]

Q All right. And Exportadora made the decision for a 6:00 o'clock departure.
A Yes, if there was something written, it must have been.
Q It was Exportadora's decision.
A Well, it's because Exportadora is a lot. I don't know.
Q The passengers were only told to be at the airport early the next morning.
A At dinnertime we came to that agreement.

* * * *

[RT XIV 54:10 - 54:12]

Q Now, you never told any of the passengers that Exportadora would not be responsible for the return flight.
A No, I did not see them except for that one time.

[Emphasis added.]

* * * *

[RT XIV 54:20- 55:12]

Q You never told the passengers who the pilot worked for, correct?
A I do not recall.
Q Exportadora always provided round-trip transportation for guests who arrived on the company airplane in Guerrero Negro.
A Whoever went had to return, but not necessarily in the company airplane. I don't know what arrangements may have been made.
Q All right. In this case, Exportadora transported the guests back to San Diego.
A What I know is Aviones Sonora was going to transport them to Tijuana.
Q But it was Exportadora who had the agreement with Aviones.
A Yes.
Q The passengers had no agreement with Aviones.
A No.

[Emphasis added.]

* * * *

[RT XIV 55:24 - 56:8]

Q Let me understand your testimony then. Your testimony is that the pilot was introduced to the passengers.
A Yes.
Q And that he was introduced as the pilot that Exportadora chose for the company flight the next day.
A It was not emphasized. It was said, "This is the pilot that is going to take you." That's how I told them. "This is going to be your pilot tomorrow."
Q All right. And that's all that was said?
A That I recall, yes.

[Emphasis added.] * * * *

[RT VII 77:2-6]

FRAZIER - DIRECT

Q Ms. Frazier, you told Mr. Hernandez that, if he and Mr. Schoenberg traveled to San Diego, then Exportadora would transport them round-trip to Guerrero Negro and back, correct?
A Yes, I did.

* * * *

[RT VII 12:3-13]

GUZMAN - DIRECT

Q Now, referring to paragraph 4 on page 2 of this declaration [Exhibit 72-3], and I quote -- referring to the agricultural project, quote:

> "Although Exportadora has no involvement in the experiment, it has been encouraged by the government of Mexico to assist the Japanese as a courtesy to its co-stockholder in Exportadora and Tottori University."

Unquote. That's a true statement, isn't it?

A Yes, sir.

[Emphasis added.]

* * * *

[RT VII 21:17-22:13]

Q Now, quoting from paragraph 9, I quote:

> "The other three passengers on the flight were Japanese. Two were members of Tottori University in Japan which has been conducting an agricultural experiment on land next to Exportadora's production facility with the cooperation of the Mexican government. The third apparently was returning to Japan from Mexico City and Exportadora had been asked to arrange air transportation for him to Tijuana."

Unquote. Now, it's true that two of the passengers were from Tottori University; is that right?

A From my recall, yes, they did.

Q And it's true, too, that Ms. Izumi [San Diego employee] handled communications with Tottori University, didn't she?
A Yes, she did.
Q But it is not true that the third passenger was returning to Japan from Mexico City, is it?
A I don't remember that.

[Emphasis added.]

* * * *

[RT VII 23:6-17]

Q Now, referring to page 2, paragraph 6, in the last sentence it says, and I quote:

> "Exportadora is not involved other than providing assistance as requested by the government of Mexico."

Unquote. Is that a true statement about the agricultural project?
A Yes, it is.
Q And part of the assistance that you provide to the agricultural project is transportation for the Japanese scientists, correct?
A Yes, it is.

[Emphasis added.]

* * * *

[RT VII 26:3-11]

Q Your statement that the San Diego office had no records indicating that Mr. Omachi intended to visit your offices -- that is not true, is it?
A That is -- okay, is not true.
Q In fact, the morning that the airplane crashed, you were waiting for Mr. Omachi at the San Diego

office, weren't you?
A Yes, I received instructions from Mexico City to meet the plane, and I saw the passenger list.

* * * *

[RT VII 29:8-11]

Q And on Wednesday, the 30th, Doctor Sugimoto, Doctor Kodani and Mr. Omachi were scheduled for return flight in the company airplane according to this document, correct?
A That's correct.

[Emphasis added.

* * * *

[RT VII 41:14-19]

Q Mr. Guzman, is it true that, on page 158 [of your deposition], beginning at line 21, that you have personal knowledge or are personally familiar that in any case you can think of where the company provided one-way transportation, the company provided round-trip transportation, correct?
A Normally, we provide round-trip transportation.

* * * *

[RT IX 3:10 - 3:22]

FISHER - DIRECT

Q Mr. Fisher, what is your understanding of what the visibility minimums are for what is called visual flight rules weather -- that is, VFR weather in the United States?

A In the United States, the minimums are a ceiling of 1,000 feet or a visibility of three miles.

Q What is your understanding of what is the required minimum visibility in Mexico in 1987 for VFR weather?

A I understand that the minimum -- the VFR minimums in Mexico at that time were five miles.

Q And is there a ceiling minimum also in Mexico for VFR weather in 1987?

A Also 1,000 feet, the same as in the U. S.

* * * *

[RT IX 9:24 - 10:19]

Q If a pilot, on September 29, 1987, had called the San Diego Flight Service Station -- let me rephrase that.

If a pilot, on September 30, 1987, early in the morning had called by telephone the San Diego Flight Service Station, what forecast would he have found for the San Diego area for the morning of September 30th?

A At what time of day?

Q Well, let's say the forecast for 8:00 o'clock in the morning on September 30, 1987.

A And what time would he have called to get the information?

Q Let's say that he called at 5:30 in the morning.

A All right. At 2:33 in the morning, a forecast

was -- probably for San Diego, which was valid from 3:00 a.m. that day -- the 24-hour forecast -- until 3:00 a.m. the next day -- these are Pacific Daylight Times I'm talking about now. The forecast was for a ceiling of 200 feet obscured -- an obscuration there -- visibility, one-half mile with fog, occasionally a ceiling of 200 feet broken and two miles with fog. And that would be valid until 11:00 a.m. Pacific Daylight Time.

[Emphasis added.]

* * * *

[RT IX 11:5 - 11:23]

Q All right. Now, let me ask you a question about that, Mr. Fisher. What is your understanding of what is the required minimum visibility for an instrument landing for this particular flight, XA KOA, at Tijuana Airport on the morning of September 30, 1987? Do you have an understanding of what the required minimum visibility is for an instrument landing?

A With just a little bit of ambiguity, I have an understanding, yes. It's either three-quarters of a mile or one mile, as the landing minimums there, I guess depending on the type of aircraft operation. I'm not quite positive which one applied in the case of this aircraft.

Q I see. But, in the event that either one of the two minimum visibilities that you just mentioned applied, isn't it true that the forecast of half-mile and 200 feet ceiling would be less than minimum visibility?

A The forecast for San Diego would be less than the landing minimums under any circumstances at Tijuana, yes.

[Emphasis added.]

* * * *

[RT IX 14:11 - 15:16]

Q Mr. Fisher, could you identify for the record Exhibit 12-3?
A Exhibit 12-3 are what are called San Diego County forecasts. These are plain-language forecasts that are often broadcast, starting on the 29th of September.
Q Does Exhibit 12-3 contain the kind of broadcast that would be, say, broadcast on the radio?
A Yes.
Q Commercial radio? And what kind of weather forecast is contained in 12-3 for the morning of September 30, 1987 as to fog?
A There are at least two forecasts -- I think three forecasts issued here, each of them in two sections -- one of them for downtown San Diego and one of them for San Diego County, which is broken up into sections. The first forecast was issued at 10:00 a.m. on the 29th. This would be a 24-hour forecast. They are saying, "A weak, shallow marine flow will send fog and low clouds inland during the late-night-through-mid-morning hours," talking about the morning of the 30th.

And at 4:00 p.m., they say basically -- they say, "Coastal strip and inland valleys, coastal low clouds and fog, night and morning." So, that's just to verify that narrative there. The forecast that was issued at 4:00 p.m. -- that would be six hours later on the evening of September 29th -- said basically the same thing. The text says, "Low clouds with areas of dense fog along the coast, will continue night and morning hours." And they go on to say, "The coastal strip will experience coastal low clouds and fog, with areas of locally dense fog mainly in the early-morning hours." [Emphasis added.]

* * * *

[RT IX 30:17 - 31:4]

Q Is it your understanding that this [Tijuana] forecast for temporary ceiling 1,000 feet, two miles is an IFR weather forecast -- forecast for IFR weather conditions?

A That would be IFR weather conditions, yes.

Q And so, is it right, then, that the forecast here on this third page of Exhibit 12-6 for the time prior to 8:00 o'clock in the morning on September 30th was an IFR weather forecast?

A The forecast was for IFR conditions. The four miles would make it even a prevailing IFR condition. And then, it's temporarily even lower, still IFR, valid until 8:00 a.m. That forecast was later revised, incidentally, downward.

[Emphasis added.]

* * * *

[RT IX 35:16 - 35:25]

Q What was the weather observed at Tijuana at 7:00 o'clock in the morning on September 30, 1987?

A At 7:00 a.m., Tijuana was observing an indefinite ceiling of 900 feet. With an obscuration, sir, the ceiling is always classified as indefinite because with an obscuration, we have ground-based phenomena. And so, this is basically just simply the vertical visibility. He's claiming he can see upward for 900 feet.

The horizontal visibility, meanwhile, was zero with fog.

[Emphasis added.]

* * * *

[RT IX 36:13 - 36:24]

Q What was the weather observed at Tijuana at 7:15 a.m. on September 30th?
A At 7:15, a teletype message -- again, this was not logged on their observation form. But, a teletype message was issued saying that they had gone to a partial obscuration, visibility was up to one mile with fog, haze and smoke. Nine-tenths of the sky was obscured. That means he could just see up through just a little hole up at the top. He could see up to the sky.
THE COURT: What was visibility, again?
THE WITNESS: One mile, sir.
THE COURT: All right.

[Emphasis added.]

* * * *

Q Do you have an opinion to a reasonable probability as to whether all of the forecasts for the morning of September 30, 1987 were for IFR weather conditions at Tijuana Airport for the time of arrival --
A They were either --
Q Excuse me, let me finish -- for the time of arrival of XA KOA at any time prior to 8:00 o'clock in the morning?
A Prior to 8:00 a.m. -- between 4:00 and 8:00 a.m., forecasts were either for IFR conditions or conditions below IFR minimums.
Q When did the forecast for Tijuana change to below-minimum conditions?
A At 7:30 a.m.

[Emphasis added.]

* * * *

[RT IX 38:3 - 38:12]

Q Do you have an opinion to a reasonable probability as to what the visibility was at the time of the accident at 7:56 a.m.?
A At Tijuana Airport?
Q Yes.
A At the airport at 7:56 a.m. -- at 8:00 a.m., they were still forecasting one-tenth of a mile.
So -- correction, they were still observing one-tenth of a mile. So, the visibility then was roughly two short city blocks at the airport.

* * * *

[RT IX 65:17 - 67:19]

FISHER - REDIRECT

Q Was Mexicali VFR all morning September 30, 1987?
A Yes, it was. The ceiling was unlimited and it had good visibility.

* * * *

[RT VII 85:2-86:3]

ROSS - DIRECT

Q What did you observe concerning the attachment of the wings to the airplane?

A The wings are attached to the fuselage through heavy carry-through spars through the fuselage. These were twisted and torn out of the fuselage, and it was basically separate, but the fuselage area -- cabin section was still laying on top of the wing section, although left and right was reversed.

The left wing was where the right wing should have been. The right wing was where the left one should have been.

In other words, the wings made 180 turn -- or 360 turn, actually, underneath the fuselage as they tore out.

(Pause.)

Q Is there a picture that shows that -- of these pictures?

A Not specifically. There are some pictures that I can point to, but from the picture you can't tell left or right, and the way I identified that the left wing was over on the right side of the fuselage was by part numbers, stamped in the wings themselves.

Q Did you have an impression of the amount of energy involved in that kind of damage to the airplane?

A Not specifically, although it was a tremendous amount of energy. In fact, the aircraft was not at a low or slow speed or stall speed. It was traveling at a high rate of speed.

* * * *

[RT VII 87:5-18]

Q What causes this kind of deformation of the exhaust stacks?
A This -- these exhaust stacks -- what you can see here have a definite crease in them. These are stainless steel stacks and very tough, very heavy, and for them to deform in that manner, they would have to be -- these stacks run red hot. They're red when the engines are running. At night you can look out and see red-hot exhaust stacks. For them to deform with nearly a V-shape in them, they would have to be hot. They would not deform that way from a cold state.
Q And if the exhaust stacks were hot, would that indicate the engine was running?
A Yes.

* * * *

[RT VII 89: 16-22]

Q What would indicate to you that it may have been running hot?
A The discoloration on the pipe. Again, that's a stainless steel pipe, and part of it is torn away; part of it is gone, and if that were cold, it would probably pretty well be intact. It wouldn't tear apart like that unless it was hot and, again, these stacks run red hot.

* * * *

[RT 91:8-16]

Q What causes the propeller hub to shatter in this manner?
A Primarily striking an object with power on it. If it strikes an object without power, it very seldom

shatters.

(Pause.)

Q So from what you saw of this propeller hub, it was your impression that the engine that this hub was attached to was under power at the time of impact?

A Yes, it had power on it.

* * * *

[RT 92:8-19]

Q Now, looking at the turbocharger at the bottom of 27-14, could you tell us whether you could form any impression from looking at that turbocharger that day?

A Yes, the turbocharger was rotating at some speed, high speed, during the crash sequence, because the blades are bent in the direction opposite of rotation, and there was rubbing on the casting where the blades rubbed and bent.

Q So that would indicate that the engine that that turbocharger was attached to was developing power at the time of impact?

A That's correct.

* * * *

[RT VII 93:22-94:6]

Q What are we looking at in that picture?

A You're looking at the piston that is inside of the prop hub which we had seen a fragment of awhile ago. The piston, the spring and the push rods that control the pitch of each propeller blade. Each one of these push rods is attached to a pin or an arm on the propeller blade which controls the pitch, and again you can see the elongation of the holes of these push rods which

also indicates power on the propellers to tear out and elongate the holes.

* * * *

[RT VII 95:14-22]

Q Could you tell us what you see in that picture?
A That looks like at least two blades of a propeller. (Pause.)
Q Now, is it significant the way in which the propeller blades are bent?
A The one that's -- I can't tell if it's sticking up in the air or sticking up to the right -- is twisted and curled somewhat, which is indicative of power being applied to the propeller.

* * * *

[RT VII 96:25-97:14]

Q What did you observe concerning the shape of that left tip tank?
A This picture shows a portion -- forward portion of the tip tank and the lines hooked to the pump that's imbedded within the tip tank and the solid bulkhead or the face of the tip tank and it is bulged out like it had a lot of fuel force on it, like a hydraulic'ing effect or we call it -- in the industry, we call it a hydraulic'ing effect to push that bulkhead out into a dome shape.
Q Does that mean there was fluid in the tank at the time of impact?
A Yes. Had there been no fuel in that tank, it would have probably been bent in the opposite direction, but the force of the fuel ballooned the tank out or barreled out in that fashion.

* * * *

[RT 104:12-15]

THE COURT: All right. Tell me, Mr. Ross, how many air crashes have you investigated?

THE WITNESS: I can't give you an exact number. Well over a hundred.

* * * *

[RT VII 106:1-2]

THE COURT: Do you wish to voir dire, Mr. Greco?

MR. GRECO: No, your Honor. I stipulate that the gentleman's a qualified expert. . . .

* * * *

[RT VII 107:10-19]

Q Mr. Ross, in the pictures that you took at the scene of the accident, are there any that you could point out to us that you believe are of significance as to causation for this accident?

A The picture that I took at the scene?

Q Yes.

A Just from the pictures alone, I don't know that there's anything that I could point out to you as cause of the accident except the aircraft was flying too low to clear the surrounding terrain.

* * * *

[RT VII 109:16-110:11]

Q Is there a picture of the other turbocharger?
A Yes, there's a picture of both turbochargers, left and right, and both of them showed indication of rotation during the crash sequence.
Q And that indication of rotation would mean that the engine to which both -- both engines then were developing power at the time of the crash?
A Yes. The engines have to be running in order for the turbochargers to be running. The exhaust system powers the turbochargers.
Q Now, referring to the third picture that is attached to the NTSB report, I think you testified earlier that there was an indication of hydraulic'ing which would mean that there was some fluid in that fuel tank at the time the impact occurred, correct?
A That's correct.
Q Could you tell us as an expert what became of the fuel?
A Well, in an impact like this, that fuel will just vaporize up into the air. It'll just so to speak splash up into the air and disintegrate and disappear.

* * * *

[RT VII 121:9-18]

Q And when you arrived to the crash site, in fact some of the wreckage had already been stolen; isn't that correct?
A That's correct.
Q And in fact, at the time you arrived at the crash site, the engines had been stolen, correct?
A Correct.
Q And at the time you arrived at the crash site, the

propellers had been stolen; is that --
A Correct.

* * * *

[RT VII 123:24-124:23]

Q Do you know whether it was necessary in this case to have the motors torn down at some point?
A From what I saw from other people's examination of them and their pictures, I don't think so.
Q All right, and why do you say that?
A Because there was every evidence of being plenty of power on the engines.
Q All right, so you do feel there was power on the engines at the time of the collision.
A Yes.
Q And you base that on what, sir?
A On pictures of the engines and the propellers and pictures -- the NTSB pictures I saw later.
Q And in particular you base your opinion that the engine was under power with respect to the propeller on the fact that the propeller piston was fragmented; is that correct?
A Say the last part of that again, please.
Q You're basing your opinion, at least some of it, on the extent to which the engine was under power on the fact that the propeller piston was fragmented or unglued; is that correct?
A Yes, and the blades were twisted and curled, indicative of striking the ground with power being applied.

[Emphasis added.]

* * * *

[RT VII 125:7-14]

Q In other words, the motors were running.
A That's correct. When you say "under power", that may be -- mean to someone that the engines were underpowered.
Q Underpowered. I see what you mean. No.
A Yes, but they had -- power was being applied to the engines.
Q All right. And you're quite certain of that.
A Yes.

* * * *

[RT VII 131:23-132:16]

Q And you had that concern because you knew that the disappearance of the wreckage would preclude you from determining the cause of this accident, didn't you?
A Not entirely.
Q All right. To what degree --
A I had enough evidence there and what I saw from other people's early work on it that I don't think there was any question about -- most of my questions about the airplane were answered.
Q What were your questions about the airplane that were answered?
A Were the engines running? How did it strike the ground? How did it come apart? And so on.
Q All right.
A I could pretty well determine all of that.
Q Except for the propellers, correct?
A Well, I looked at the pictures of the propellers, and they definitely showed signs of good power or high rotation.

[Emphasis added.]

* * * *

[RT VII 137:14-23]

Q You do have an opinion as to what caused this accident, don't you?
A Yes. Two probably main factors was the weather and probably the qualification of the pilot which I cannot substantiate.
Q When you say "the qualification of the pilot", what is your opinion in that regard?
A I've heard that he was not instrument current, but I don't know that. That's hearsay. I cannot testify to that directly.

[Emphasis added.]

* * * *

[RT VII 144:15-145:1]

Q One last question for you, sir. Did you -- did you or did you not make any effort to determine whether the ILS equipment at Tijuana Airport was operating properly during the morning of September 30, 1987?
A I did not make an effort, but the NTSB did and they flew -- they -- when I say "they", I don't know who "they" are, but there was a flight that flew the ILS to check it and yes, it was operating properly.
Q And you don't know who flew that flight.
A No, sir, I don't, but it was done in conjunction with the NTSB man, Jim Wall and whoever his Mexican counterpart was at the Tijuana Airport.

* * * *

Q What is your opinion about the pilot's failure to follow the published instrument approach procedure for the ILS for runway 090?

A If the procedure is followed on any instruments, whether it's a precision approach or a not-precision approach, it will provide for a successful landing, provided weather conditions are at or above minimums.

Q And in your opinion, then, the pilot's failure to follow the instrument approach -- the ILS approach -- was a cause of the accident. Could you explain that opinion? Why do you hold that opinion?

A The ILS is -- and/or the precision approach generally forces the lowest landing minimums. I would have to qualify that because a PAR approach, for which there is no published PAR approach into Tijuana -- the lowest minimums for an approach into Tijuana are afforded by an ILS DME approach. So, that particular approach will give you the lowest minimums -- possible minimums.

If you fly the procedure correctly and you do have the minimums, we can virtually guarantee a successful landing. You have all the guidance on an ILS approach. You have guidance -- both vertical guidance and distance guidance from the approach end of the runway. So, you have a maximum compliment of indications, both in the cockpit -- to guarantee a successful landing.

Q Does the glide slope provide information about the elevation of the airplane above the terrain?

A Yes, it does.

Q If the pilot follows the glide slope during his approach to the airport, will the airplane remain at a safe distance above the terrain?

A Yes. If the pilot follows the projector [sic. "projected"] glide slope, the correct glide slope, yes, he will -- he's guaranteed terrain separation up to the master [sic. "missed"]

approach point.
Q Do you have an opinion as to whether the pilot of XAKOA at some point left the glide slope during his approach to the airport?
A Yes, I do.
Q What is your opinion concerning that?
A He obviously abandoned, for whatever reason, the electronic glide slope, per se. And he -- resulting in the crash -- the end result.

[Emphasis added.]

* * * *

[RT VIII 20:4 - 20:16]

Q What should the pilot have done if he reached the decision height and did not have the airport in sight? What should he have done at that point?
A The law specifically says -- and we've been trained -- all pilots have been trained to initiate a missed approach. And the procedure is enumerated or detailed on the same approach -- on all approach --
Q What is the decision height at Tijuana Airport? At what decision height on September 30, 1987, should the pilot have executed a missed approach if he did not have the airport in sight?
A On Exhibit 9, I show a decision height of 736 feet MSL, 250 feet AGL.

[Emphasis added.]

* * * *

[RT VIII 21:4 - 22:14]

Q So, assuming that the visibility was below minimums and assuming that the wreckage came to rest at least a mile away from the airport -- based on those facts, do you have an opinion as to whether the pilot could see the airport at the

time of the crash?
A Yes, I do. It is quite apparent, based on the weather reports, both at the station and surrounding facilities, that it was highly unlikely that he had ground contact -- and specifically, ground contact with the ground below the fog layer. He may have had ground contact with terrain sticking out above the fog. But, I find it highly unlikely that he made contact with the actual ground below the fog layer.
Q Do you find it unlikely that he would have had the visual range to be able to see the airport runway from the point where the wreckage impacted?
A Most probably not.
Q And do you have an opinion as to whether the pilot's -- an opinion to a reasonable probability as to whether the pilot's failure to execute a missed approach when he did not have the airport in sight was a cause of the accident?
A Yes. Most certainly the end results indicate that.
Q And what is your opinion in that regard? Could you explain what the pilot should have done at that point?
A In basic terms, for whatever reason, the fact that the aircraft crashed short of the runway -- short of the airport is tantamount proof that he did abandon the glide slope, whether it was -- and/or instructions by controllers given during the approach.

Now, what reasons he may have had to do so, I would not want to conjecture on. There are a considerable number of possibilities, none of which are justifiable, in my opinion.
Q Should he have executed a missed approach?
A Yes, sir.

[Emphasis added.]

* * * *

[RT VII 23:14 - 23:18]

Q Does the pilot have the right to execute a missed approach on his own prerogative at any time?
A That's correct. He can shoot a missed approach

during any phase of a landing approach, not necessarily at the missed approach point.

* * * *

[RT VIII 32:13 - 32:19]

Q Mr. Jaax, do you have an opinion to a reasonable probability as to what kind of approach the pilot was attempting to conduct?
A Yes. I think I stand by my earlier assertion that I believe and I would have expected him to be conducting an ILS DME approach to runway 09, with its applicable landing minimums.

* * * *

[RT VIII 38:16 - 40:22]

Q Mr. Jaax, would you tell us what facts you were relying on to determine your understanding of whether the pilot was current for IFR?
A On a review of the -- of both the tapes between ATC and the aircraft in question that were sent to me -- both the tapes, as well as the written translation of the tapes, in conjunction with a general review of the pilot's log book, with particular emphasis on this exposure -- instrument exposure or possible instrument exposure, total time, et cetera, operating environment. And I tried to relate it to this performance during all phases of contact with air traffic control -- from initial contact through the termination of flight, or you might say the crash of the aircraft. I tried to put it in -- somewhat into context.

I looked in particular at the procedural aspect of the pilot's conduct. I also looked at -- listened to the tapes, to the pauses in the tapes, and tried to combine all information that I had in my hand. And assuming it is the correct information, I reached an opinion. And the opinion was that

the pilot was rather minimally -- minimally qualified, but certainly lacking experience. And I found the procedures to be quite a bit removed from what you might consider standard instrument practice, as well as suggested practices in trade journals, et cetera, et cetera -- both the U. S. and Mexican, and different, to a large degree, from anything that I've ever experienced during an instrument approach or observed other pilots -- other procedures that other pilots used making the approach.

Q Did you form an opinion about the pilot's competency to conduct an instrument approach?

A Yes, I did. I thought that he was a rather incompetent pilot in respect to procedures or procedural requirements. He was -- I also found him somewhat lacking in the decision-making process. And subsequently, that is a reflection on his pilot-in-command abilities, in my opinion.

I found it quite an unusual approach from beginning to end, if I want to summarize it -- quite unusual.

. . . .

THE COURT: He said the pilot had minimum qualifications to fly under instrument flight rules and he was incompetent to fly the approach. Isn't that what you've testified?

THE WITNESS: That's exactly what I said, your Honor -- yes.

[Emphasis added.]

* * * *

[RT VIII 80:5- 80:25]

Q Do you have an opinion of whether, on the morning of September 30th, 1987, at 6:00 o'clock, when the pilot departed -- approximately 6:00 o'clock, when the pilot

departed from Guerrero Negro, whether he would have reasonably anticipated IFR conditions at Tijuana that morning at time of arrival?

A Reasonable anticipation? Well, if your question if he expected to have ground fog, per se, or low clouds -- the answer is yes. It is probably a time of the year where it's almost (indiscernible) and usually expect to have ground fog in the San Joaquin Valley during the month of November and December, and my answer to that is yes. I think more so than during other periods of the year, specific other periods of the year.

Q You're familiar with Tijuana Airport that time of the year, late September?

A Yes, not only that, but on the Baja coast in general, yes.

Q And in the early morning is fog quite common that time of the year?

A Yes. Yes, during that time of the year, yes.

[Emphasis added.]

* * * *

[RT VIII 90:13 - 91:9]

Q Whether he had a loss of engine power or not, Mr. Jaax, do you have an opinion as to whether pilot negligence was a cause of this accident?

A Pilot negligence -- I could only qualify -- what I could definitely qualify as negligence was the -- the fact that he descended below either decision height or minimum descent altitude. That would be a clear-cut act of negligence on the pilot's part barring some undiscovered structural failure per se -- something beyond the control of the pilot, which I did not see anywhere in the record.

(Pause.)

Q In Mexico, is it standard practice for a pilot to have the option to take a look at an airport, even if that pilot is piloting an air taxi carrying passengers?

A Yes, he is -- that is permissible.
Q In the United States, is it standard practice for a part 135 pilot, an air taxi pilot, to be able to commence an approach to an airport that has less than minimum visibility for an instrument landing?
A I -- I -- for standard practice -- or is it permissible? It's prohibited by law. It's not a matter of practice. Specifically prohibited by law.

[Emphasis added.]

* * * *

[RT VIII 95:7 - 95:11]

Q Do you have an opinion of whether failing to hold over the station until the weather improved was a cause of the accident?
A Yes, I think that's what I -- I think I -- I -- I tried to convey that.

* * * *

[RT VIII 114:20 - 115:4]

JAAX - CROSS

Q Now, did you say that this pilot received information pertaining to the Tijuana weather conditions at the time of his approach?
A Did I say it?
Q Did you say it? My notes aren't clear.
A Yes, I understood -- the tape that I reviewed -- the tape that I reviewed, considering it was -- I'm assuming that it was the tape, the actual tape of the conversations among the people involved -- indicated to me yes, that the controller gave him a weather report.

* * * *

[RT VIII 129:14 - 130:23]

THE COURT: I will ask another -- a summary question here. In stating your opinions, you have told us that you believe that the pilot in control of XAKOA on the morning of September 30th was negligent in the following: that he descended below the appropriate glide path on making the approach to runway 9, Tijuana Airport.

THE WITNESS: Yes. That's accurate.

THE COURT: That, under the then-conditions of visibility, the pilot attempted an approach either by using the localizer of the otherwise instrument approach which you have described you believed was the approach he probably made when a reasonable, prudent pilot under those conditions would not have made the approach to the runway 09 at Tijuana Airport.

THE WITNESS: That's essentially correct.

THE COURT: Tell me what may be incorrect about it. Have I misstated it?

THE WITNESS: No, your Honor. I think --

THE COURT: Are there any other -- are there any other bases of -- that you would find the pilot negligent at that time and occasion within a reasonable probability?

THE WITNESS: Any other factors?

THE COURT: Any other --

THE WITNESS: I think that's paramount to -- answers your question -- I think you're essentially correct. I think that --

THE COURT: Well, I just want to summarize your testimony, and that you found that either or both of these causes within a reasonable degree of probability contributed to the cause -- the crash of the aircraft approximately a few minutes before 8:00 o'clock on the morning of September 30th.

THE WITNESS: Yes, sir. I think that's --

THE COURT: All right.

THE WITNESS: Yes, sir. [Emphasis added.]

* * * *

[RT X 61:24 - 62:10]

TAYLOR - DIRECT

Q Did you form an opinion to a reasonable probability of whether the pilot was ever on the glide slope?
A I didn't extend the vertical measure of the glide slope out to the point where the pilot turned on to the center lined, but it would be my opinion that he probably -- I know the airplane was well below the glide slope at least from Alba inbound, or from his report at 2,500 feet or thereabouts. But I would conclude that the airplane was well below the glide slope throughout the entire episode, and most certainly at and immediately before impact, since the impact was below the level of the runway and the glide slope just doesn't go down there.

[Emphasis added.]

* * * *

[RT X 62:24 - 65:20]

Q What is the pilot responsible for in flying an ILS approach?
A In simplest terms, the pilot is expected to fly his aircraft so that it remains on the localizer, which is an electronic extension of the center line.
THE WITNESS: And, your Honor, it's that -- it looks like the shaft of an arrow or -- up there on the plan view. See the -- half of it's cross hatched? That's the electronic extension of the center line of the runway and if the -- it is displayed to the pilot in the form of a vertical indicator right in front of him, that moves to left or right as the airplane deviates once side or the other

from that center line.

His other responsibility is to maintain the aircraft on the glide slope, which does the same thing as a localizer, but turns 90 degrees, so that it provides a -- in this case, a three-degree slope right down to the runway. And -- and it followed all the way down. It typically intersects the runway surface at about 1,000 feet from the threshold. This is indicated to the pilot by horizontal bar or indicator of some sort that moves up and down and tells the pilot whether he is above or below the glide slopes.

The third area of responsibility would be the observation of what's know [sic. known] as the decision height. On every ILS approach, a pilot is authorized to fly on those two courses, vertical and horizontal guidance, down to an altitude on his altimeter which represents a certain number of feet above the ground. When he reaches that point in space, and it is always the same point in space if the pilot is on the glide slope and on the localizer -- in other words, the decision height is a published altitude on those two courses. When he reaches that point, he just make a decision -- this is one of the most aptly named terms in the whole business -- decision height -- he must make a decision whether to continue to a landing or execute the procedure known as a missed approach. In other words, add power, pull up, fly away from the ground -- and there's a published procedure to tell him what to do next.

So quite literally -- of course, there's a lot of -- of control manipulation and technique and power management and all that involved, but that's what a pilot must do. Stay on those two courses, fly on the localizer, on the glide slope, to a decision height. When he gets there, if he sees the runway and can land, he will. If he cannot see it, he is obliged to execute missed

approach.
BY MR. FOOR:
Q What is the decision height for this approach to Runway 090 -- the decision height that in effect on September 30th, 1987?
A For this particular airplane, that decision height is down here in the lower left-hand corner and it's 786 feet on his altimeter, which is related to feet above sea level. And then in parenthesis following that, that is 300 feet above the touchdown zone of the runway, the very threshold.
Q What was the minimum visibility for an instrument landing for XAKOA on September 30th, 1987?
A Because it was a non-scheduled flight, it falls into that box -- the same one I just pointed to, and the visibility was either 1,600 meters or one mile -- one statute mile. In other words, if he did not have -- if a pilot flying this approach did not have the runway lights or the runway itself in sight at that point, one mile out, then he could not legally continue to a landing.
Q Do you have an opinion as to a reasonable probability whether a pilot's failure to follow the glide slope was a cause of this accident?
A Oh, I think it was the cause of the accident. The crash occurred on the localizer, but obviously well below the glide slope.

[Emphasis added.]

* * * *

[RT X 72:14 - 73:3]

Q Do you have an opinion whether the altimeter setting was a factor in this case?
A I do.

Q What is that opinion?
A It was no factor.
Q Why not?
A I say it was no factor unless the pilot did in fact make a gross error in setting his altimeter. And I would be surprised to find that were the case, and it -- it just doesn't fly, because if the pilot remained on the glide slope, he would have crashed on the runway in this case. He would not have crashed a mile short and a hundred and some-odd feet below the level of the runway. So even with a missed altimeter, even with a malfunctioning altimeter, this accident scenario would not have occurred.

[Emphasis added.]

* * * *

[RT X 76:25 - 77:24]

Q Now, one question I have pertains to the distance. You mentioned distance -- that the localizer is the extended center line of the runway? Did you -- did you make an estimate of how far along the localizer the pilot was at some point during this approach?
A One of the radar-derived positions put him two and a half miles from Alba. Alba itself is 6.3 miles from the end of the runway, so that would put him at about at least eight and a half miles from the runway on the localizer, and of course, he had to turn to get onto the localizer, so my best estimate would be that when he intercepted the localizer -- when he turned eastbound toward the runway, he probably would have been on the order of 10 miles from the runway.
Q And is it your understanding that the localizer extends into the United States at that point?

A Oh, yes, indeed it does. It extends into the United States almost from the end of the runway.
Q So then at some point the pilot would have been about 10 miles inside the United States?
A Well, I don't know -- he wasn't 10 miles north of the border, he was -- he would have flown nine or 10 miles roughly in U.S. air space before he once again crossed the border into Mexico in the very final stages of the approach.

[Emphasis added.]

* * * *

[RT X 81:16 - 82:13]

Q Do you have an opinion to reasonable probability as to whether the pilot of XAKOA failed to execute a missed approach after reaching the decision height without the airport in sight?
A Yes, I do.
Q And what is that opinion?
A If he had executed a missed approach at decision height, even though he were below the glide slope at the -- at the time, he would have been 300 feet above the elevation of the runway, and therefore, more than that above the elevation of terrain into which he crashed. So if he had disregarded the guide slope indications totally -- if he had reached decision height, did not see the runway, which at that point was just impossible due to the fog -- if he had executed a missed approach at that point, just based on altitude, we wouldn't be here today, or not for this reason anyway.
Q Do you have an opinion to a reasonable probability as to whether failing to execute a missed approach after reaching decision height without the airport in sight, was the cause of the accident?

A Yes, in that that situation is rather descriptive of flying the airplane at a dangerously low altitude, yes.

* * * *

[RT X 88:6 - 88:23]

Q Do you have an opinion to reasonable probability as to whether Raul Gutierrez was qualified to act as pilot in command of this flight, if it was an IFR flight?
A If the pilot or the person who dispatched this pilot were aware of the probability of IFR conditions at Tijuana on that morning, then the pilot's qualifications would have not been there and he should not have been sent on this flight. I think this is doubly important because of the paucity of alternate courses of action in a flight like this. There really was only one other place to go, and that's Mexicali, and if Mexicali were not suitable to complete the mission as dispatched, then it -- it should never have been sent. But -- but this pilot, to the best of my knowledge, and in my opinion, not being an instrument-qualified pilot, didn't stand the chance, if in fact it was going to be IFR when he arrived at Tijuana, much less if visibility were such that he could not reasonably complete this instrument approach.

[Emphasis added.]

* * * *

[RT X 91:13 - 92:6]

Q Mr. Taylor, I'd like to place before you a document that's been marked and entered in evidence as -- it's -- in this matter -- page three, and this is a terminal forecast for Tijuana airport, abbreviated TIJ, for 11:00 p.m. the night before the flight, 600 hours

Zulu would be 11:00 o'clock at night the night before. Could you tell us whether this forecast where it says, "Temporarily -- ceiling 1,000, two miles, fog and haze" -- whether that is an IFR weather forecast?

A Yes, indeed, it is.

(Pause.)

Q So do you have an opinion then as to whether if the pilot had the latest forecast for Tijuana Airport at 11:00 o'clock at night the night before the flight, whether the pilot would have known that the weather conditions would be IFR the next morning?

A Well, he doesn't know that they would be, but he is put on notice that that is a very strong possibility, if not a probability . . .

[Emphasis added.]

* * * *

[RT X 118:18 - 118:24]

TAYLOR - CROSS

Q All right. Well, didn't you testify in this courtroom that Mr. Gutierrez had duty to determine the weather prior to his departure from Guerrero Negro?

A I did, and if Mr. Gutierrez had utilized the same sort of information that I had -- forecasts, and applied his knowledge to it, I think he would have come up with a probability of fog.

[Emphasis added.]

* * * *

[RT X 119:12 - 119:25]

Q What does the time of day have to do with

whether or not he should check prior to departure?
A Fog historically occurs after a clear night, early in the morning hours at and shortly after sunrise.
Q Have you any substantial or reasonable basis for assuming that that is indeed the pattern here in Baja, California during the mont of September of 1987?
A The month of September has nothing to do with it. The Tijuana/San Diego area has nothing to do with it. Coast -- low lying coastal areas are by definition, located in close proximity to large bodies of water, providing the moisture necessary which when moved over cooler land, turns into fog. This is something that we teach pilots from day one of basic meteorology.

* * * *

[RT X 121:12 - 122:13]

Q What I'm getting to is, based on Mr. Foor's own expert meteorologist, the three days next preceding the accident -- the pattern of visibility at Tijuana at 8:00 a.m. in the morning was well in excess of five miles of visibility. So can you tell us why in light of that pattern -- that evidence -- you've taken it upon yourself to assume that this pilot should have foreseen fog on September 30th?
A I can, especially in light of the fact that the night before was a very clear night. In that case, the radiation of heat from the earth increases rather remarkably and again when put in the context of a low lying coastal plane, with an on-shore wind flow and very little difference between temperature and dew point, pilots are taught from day one to expect the formation of fog. If it doesn't form, wonderful. But what if it does?
Q Well, just a minute, sir.
A A pilot can't rely on what has happened the last

several nights.

Q Well, just a minute. Let's take your thesis, if we may, or premise or whatever you choose to call it. You're saying because the night before it was clear, the pilot should have assumed that the next day would be foggy?

A Not necessarily. The pilot should have been aware of the probability of fog formation following an evening like that. It's a classic fog producer. Pilots are taught that.

* * * *

[RT X 123:9 - 125:5]

Q Given this pattern, you still believe, sir, that the pilot should have foreseen fog at 8:00 a.m. on the morning --

A He should have foreseen the possibility of fog, yes, particularly since he appears to have not been qualified to fly on instruments, and particularly since this flight involves over 300 miles with only one alternate course of action open to him.

Q So you're telling his Honor that not withstanding the pattern of at least the three days before of an absence of fog, the pilot should have seen -- he should have foreseen fog; is that right?

A Absolutely.

Q All right. Now, you're very, very clear on your testimony in that regard; is that right?

A I don't think I could be any clearer.

Q I agree. Now, I want you to tell us if you would, sir, what education and experience in weather forecasting and weather observations do you have that entitles you to make that type of a statement?

A For about the third time, I'm saying to you that

the conditions that existed in Tijuana that morning were the classic fog producers that we teach pilots from the very beginning. You don't have to be a forecaster. You don't have to have a lot of experience as an observer. We teach pilots that these are the conditions that will probably very likely produce fog, and to be aware of them and to take whatever precautions need to be taken to do whatever else might need to be done, if in fact fog forms. If it doesn't form, thank you, Mother Nature. No -- you know, nothing else to worry about. But if it does form, now, I've got a concern about it.

(Pause.)

Q One -- one more time. What education and experience do you have that entitles you to offer opinions on the extent to which prior weather conditions are necessarily indicative of fog the following day? Do you have any training as a meteorologist?

A Again, I go back to my position as a pilot expert which I explained early on, encompasses basic meteorology. This is taught in every weather course that any pilot has ever attended. So my experience, my training has been in numerous such courses in the military, numerous such courses in the civilian aviation community and the fact that I taught those things and therefore had to become aware of them. I've read and studied and looked at books and talked to meteorologists.

[Emphasis added.]

* * * *

[RT X 142:19 - 143:7]

Q All right.

A As far as this regulation goes, it is possible that this pilot qualified under this regulation. As far as this

pilot's ability to successfully prosecute or -- excuse me, execute an instrument approach procedure, there is nothing that indicates to me that he had that capability.
Q I understand that, sir, but I wasn't talking about your views as to his overall competence. If you could try to keep my question in mind, what I was asking you about is your opinion that he had violated a certain Mexican aviation regulation. This Defense Exhibit SS2 does not speak to generalized competence, does it?
A No, we're talking about instrument competence.

[Emphasis added.]

* * * *

[RT X 144:14 - 145:1]

THE COURT: I'd like to leave this point by saying this: that this witness has testified that it's possible that this pilot qualified under the regulations of the Republic of Mexico, but in looking to his actual competency, the witness says that he's not competent to conduct a IFR approach.

Isn't that the substance of what you told us?

THE WITNESS: Yes, sir. Demonstrated --

THE COURT: All right.

THE WITNESS: -- very clearly to us.

THE COURT: The certification and the authorization can lead to one side -- he's talking about competency.

[Emphasis added.]

* * * *

[RT X 145:21 - 145:23]

Q Now, you said the pilot, in your view, was not competent, correct?
A That's correct.

* * * *

[RT X 147:7 - 148:6]

Q All right, then let's focus on that moment here. What is it about the moment here that leads you to conclude with such certainty that this pilot was incompetent?
A The very fact of the way that he -- the instrument procedure was executed.
Q In other words, the mere fact that the pilot failed to follow the glide slope?
A That I would say is the most glaring demonstration of the lack of competency, yes.
Q Do you know that the pilot --
A Plus -- excuse me, plus the pilot -- plus, the pilot failed to observe one of the -- if you'll pardon me, the bottom lines of an operation such as this. If -- a pilot has surely got to know when he commences an approach like this, what his minimum altitude is. He's got to have a mental picture of what the altimeter is going to look like when he gets there. He's got to watch it under the lining and decide when he is there. Going below that altitude, which is only 300 feet above the runway in this case -- going below that altitude with no visual contact is one thing. Going down to the published altitude of the runway is something else, and flying the airplane to an altitude even below the level of the ground on the landing surface is almost unbelievable.

* * * *

[RT X 180:12 - 180:23]

MR. GRECO: All right. I'd like to read for the record, your Honor, page 126, lines 11 through 20.

> "Answer: May I state for the record, though, that the tower makes no weather observation. Those observations are being made downstairs by the people that elaborate that form. Approach had absolutely no way to look outside to say what the weather was like, except upon a weather report transmittal from the weather reporting station."

* * * *

[RT X 216:17 - 217:1]

Q Let me ask you, sir, had you previously discussed with Mr. Foor the extent to which Tijuana Air Traffic Control caused or contributed to the pilot --

A Yes, we discussed that.

Q What discussions have you had about it?

A That was brought up as one of the possible considerations in this case and I assured Mr. Foor from the very beginning -- the first time it was mentioned, that in my opinion, the air traffic controller had nothing to do with the cause of this crash. Absolutely nothing.

[Emphasis added.]

* * * *

[RT XVIII, March 8, 1993, 51:4 - 51:20]

Defendant's Closing Argument

THE COURT: All right. When I decide -- I'm probably going to decide on all issues. Regardless of how I find on liability, I will probably make findings on the damages as well. I'm going to make findings on all of the issues that were tendered in this case because it's been a long time coming here to trial, and I want to put it in a position -- no matter how I decide that they -- if they ultimately say I'm right or wrong or if they don't think I'm wrong and correct it, if it gets -- of simply adopting -- if I should find against Mr. Foor's clients -- I'll have findings on damages, they can just say (indiscernible). So I'll let you argue everything in this case. I'm not raising these issues. I'm not saying to you exactly what I'm going to do in this case, but I recognize that -- and I recognized in the beginning that there were circumstances in this case that sort of narrowed the choices that you could make as a defense attorney.

[Emphasis added.]

* * * *

[RT XVIII, March 8, 1993, 54:23 - 60:8]

THE COURT: Let me put this to you. There is not much doubt is there that Mr. Matsushita was an agent of Exportadora in negotiating or making arrangements for the Japanese visitors, is there?

MR. GRECO: I would hesitate to go that far and say that he was an agent for Exportadora. He may have been acting as an agent for them --

THE COURT: Certainly they sent -- Exportadora sent Telexes to him and for instance, knew

to ask him for information concerning the agricultural project and Matsushita responds to this, so --

MR. GRECO: He was in the loop.

THE COURT: Right, and --

MR. GRECO: Clearly.

THE COURT: But he's the one that communicates with the Japanese visitors, and we don't really know perhaps the terms -- the way that he communicated with the Japanese visitors or how they communicated with him. But we do know that there were some agreements arrived at. We knew that those -- at least the principal terms of the agreements that had to do with when Mr. Omachi and Mr. Sugimoto, and Mr. Kodani would arrive at Tijuana -- would arrive in San Diego, and when they expected to return. And we do know because we have -- some Telexes that we do have the schedules -- the schedules have been made up by Mr. Pellegrino for the -- we do know that there was an agreement to provide beyond San Diego transportation and accommodations for the Japanese visitors. That's not in dispute, is it?

MR. GRECO: I don't dispute that, your Honor. What I have a great deal of trouble with is the suggestion that Exportadora or its counsel, whether it was this counsel or past counsel, somehow withheld documents, that's not my practice.

THE COURT: Oh, I --

MR. GRECO: And that's what he's saying.

THE COURT: What I'm saying is we -- I'm looking at what was the agreement, and there isn't much dispute really as to what the agreement was. Regardless of that we don't have a communication from Matsushita to Sugimoto, Kodani or Omachi.

MR. GRECO: There was -- there is not any dispute in my mind but what -- the fact that there was an agreement, and what some of the essential terms

were, but in his closing arguments he states that there were definitely -- or words to that effect -- was a promise for round trip travel on the company airplane. That's not my understanding of the agreement, and certainly the evidence didn't show that.

THE COURT: We had a little trouble with that -- did you look at the schedules? Because they did schedule them on Westwind and they were round trip.

MR. GRECO: That was -- there was an internal document, but the fact that there's a scheduling -- there's no evidence to suggest that it was concurrent with the scheduling or prior to it. A promise to either or any one of the decedents for round trip transportation.

THE COURT: Well, would you look at that -- what evidence did you have, such as what's in the Telex, what's in the schedule -- to decide or infer what the agreements were. There really is not a lot of argument, is there? Because the schedules were provided for two weeks ahead, and they came out every week. But we do know that the scheduled return was on Westwind.

MR. GRECO: We did know that.

THE COURT: Okay. And so we could say that at least within the contemplation of both Exportadora and the Japanese visitors they were going to be returned on the Westwind -- on September 30th when it left Guerrara Negro to Tijuana.

MR. GRECO: I can say that based on the internal documents I've seen that was within the contemplation of Exportadora.

THE COURT: And isn't this the best evidence of what the agreement was?

MR. GRECO: Not necessarily. I don't know what was --

THE COURT: Just tell me what other evidence --

MR. GRECO: Well, you have Telexes, your Honor, incoming from Matsushita saying, "Arrange transportation by company plane/car, by pickup truck/company plane". I mean that to me is also evidence that there was nothing set in concrete.

THE COURT: No, but what they -- what Exportadora did was in the scheduling, and they put it on their schedules, and that's the only to schedule it, isn't it?

MR. GRECO: No, there is no doubt that there was this internal scheduling. In fact, the testimony I think from Exportadora's own representatives was that if the company plane was available that the people would be returned on the company plane.

THE COURT: Well, tell me how they were going to get Omachi back to -- on September 30th at 12:50 to LAX and a trip to Guerrero Negro unless they did schedule it as they did.

MR. GRECO: Scheduling him on the company airplane?

THE COURT: As they did.

MR. GRECO: Well --

THE COURT: Well, I mean there is no way he's coming up by car on the morning of September 30th --

MR. GRECO: The way they would have got him up here is the way that was contemplated on the air taxi. It didn't have to be the company airplane to get him back up to Tijuana. At least, there is no evidence --

THE COURT: It's a nine-hour trip, I thought, from --

MR. GRECO: No, no, I'm suggesting that it did not have to be the company airplane that took him.

THE COURT: No, it didn't have to be the company airplane. It wasn't in this case because they

did --

MR. GRECO: Well, certainly not a car or a bus. I understand that. But I'm not sure that there is any evidence that suggested Exportadora knew prior to the time that Mr. Omachi came to Guerrero Negro that he had to be back by 8:00 a.m. -- or I'm sorry -- that he had to be in LA by 12:15.

THE COURT: Well, why did they schedule him on that morning flight?

MR. GRECO: I don't know, your Honor, what was told --

THE COURT: Because that's the only evidence of when he was scheduled, isn't it?

MR. GRECO: Yes.

THE COURT: And when Matsushita communicates with him by Telex. Hasn't he pointed that out, he's saying, "You'll arrive at San Diego but he has to get back at 12:00 so he can catch the flight from LAX"?

MR. GRECO: That's correct, but again what I'm saying is if we are looking for proof by a preponderance of an agreement that there ought to be some proof, some testimony, some something that demonstrates that there was this alleged promise to transport these decedents round trip on the company airplane, and to my knowledge that evidence does not exist. If the Court's apt to engage in inference and the like, then perhaps one could do that, but --

THE COURT: But inference is perfectly legitimate in determining what is probability or not.

[Emphasis added.]

* * * *

"Even more destructive of plaintiffs' contrived res ipsa loquitur theory is the fact that such a theory rarely applies, if ever where the transporter is not acting as a common carrier. That is, plaintiffs suggest that an "inference of negligence" arises, by operation of the doctrine of res ipsa loquitur, "where a passenger on a common carrier is injured." [Footnote omitted.] However, unhappily for plaintiffs, Aviones was not acting as a common carrier on the specific flight here involved. Rather, under prevailing decisional law, Aviones acted as a private carrier, when conducting the September 30, 1987 flight.

Generally speaking, Aviones is, and was, a national air taxi company and 'a Mexican common carrier'. [Footnote 40: Notably, the Pre-Trial Order does not characterize Aviones as a common carrier for the specific flight here involved.] However, where, as here, a common carrier contracts to provide a special flight or service for a specific person or group of persons, that carrier acts as a private carrier. In that regard, the following holding is instructive:

'The current status of the law seems clearly to be that when a common carrier contracts to render a special service for a group of individuals or a public agency it thereupon becomes a private carrier. Such is the law as declared in a host of authorities from the United States Supreme Court and from many federal and state courts. [Citations and block quotations omitted.] . . . . when the common carrier is 'acting outside the performance of its duty as a common carrier.' In such event, it deals with 'matters involving ordinary considerations of contractual relation' and is acting as 'merely a private carrier in respect to the plaintiff, [and owes] him merely the duty of ordinary

care.' Hopkins v. Yellow Cab, 114 Cal.App.2d 394, 397-398 (1952). [Emphasis added.]

In short, to the extent that plaintiffs rely on common carrier status to invoke the res ipsa loquitur doctrine, they cannot properly do so because under the specific circumstances here involved Aviones was acting as a private carrier." Exportadora's Reply to Plaintiffs' Post-Trial Brief, served March 1, 1993, p. 37:5-38:18. Case no. 88-1532, CT 276, 37:5-38:18. [Emphasis added.]